Supreme Court, U.S.
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No. 98-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,*
Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in reserving to the United States "coal" in lands patented under the 1909 and 1910 Coal Land Acts, 30 U.S.C. §§ 81, 83-85, while passing the surface land and all other minerals (including natural gas) to the patentee, Congress reserved only the solid rock fuel commonly known as "coal," but not natural gas in coal formations, as the Department of Interior determined in a formal Solicitor's opinion entitled to judicial deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

LIST OF PARTIES AND AFFILIATES

In addition to the petitioners, the following federal agencies and officials were defendants-appellees below:

> Manuel Lujan, Jr., Secretary of the United States Department of Interior; the Department of Interior, and its subordinate agencies; Bureau of Indian Affairs; Bureau of Land Management; Minerals Management Service; Eddie F. Brown, Assistant Secretary of the Bureau of Indian Affairs; Delos Cy Jamison, Director of the Bureau of Land Management; and Scott S. Sewell, Director of the Minerals Management Service.

There was also one defendant who was not an appellee: Tiffany Gas Company.

Pursuant to Rule 29.6 of the Rules of this Court, Amoco Production Company declares that its parent company is Amoco Company (whose parent is Amoco Corporation), and that it has no subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Amoco Production Company ("Amoco"), on behalf of itself and the class of defendants it represents, hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 119 F.3d 816 (Appendix to Petition for Certiorari ("App.") 52a-94a), and the opinion of the court of appeals *en banc* modifying the panel opinion in part is reported at 151 F.3d 1251 (App. 1a-51a). The opinion and order of the United States District Court for the District of Colorado awarding summary judgment to petitioners is reported at 874 F. Supp. 1142 (App. 95a-132a).

JURISDICTION

The order of the court of appeals *en banc* reversing the district court's order of summary judgment was entered

on July 20, 1998. This Court granted an extension of time in which to file the petition for certiorari to and including November 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are 30 U.S.C. §§ 81 & 83-85, which are reproduced in the appendix at 133a-136a.

STATEMENT OF THE CASE

In the Coal Land Acts of 1909 and 1910, 30 U.S.C. §§ 81 & 83-85, Congress reserved "coal" to the United States in any lands patented thereunder, while passing the surface land and all other minerals (including natural gas) to the patentee. Respondent the Southern Ute Indian Tribe ("Tribe"), owner of reserved coal in certain Colorado lands pursuant to a 1938 transfer from the United States, claimed that the reservation of "coal" included natural gas found in coal formations.[1] In a decision flatly at odds with the statutory language and legislative history, a divided court of appeals held that the word "coal" in the 1909 and 1910 Acts was ambiguous. App. 32a-33a. In resolving that ambiguity, the court refused to give deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a formal and binding opinion of the Solicitor of the Department of Interior that Congress' reservation of "coal" did not include coalbed gas. The court held

[1] Natural gas in coal formations, often referred to as "coalbed gas" or "coalbed methane" (CBM), is chemically indistinguishable from natural gas found in other formations. Natural gas exists in coalbeds in the same physical states as it does in other reservoir rocks, as the Department of Interior has recognized. *See Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation*, 98 Interior Dec. 59, 60 (1990) (App. 165a-166a). Like other natural gas, CBM is produced from gas wells and processed in gas plants; it is combined and transported in pipelines with gas from other geologic formations; and it is used for the same purposes.

that *Chevron* did not apply to a statutory interpretation not embodied in a legislative rule promulgated by notice-and-comment procedures or in an agency adjudication. App. 83a-88a. Accordingly, it applied the presumption that ambiguity in land grants is resolved in favor of the sovereign, and held that by reserving "coal" Congress also reserved natural gas in coalbeds (but not the gas that may have migrated from coalbeds to adjacent rock strata). App. 33a & 18a n.8. In this Court, petitioners challenge the court of appeals' contorted interpretation of the 1909 and 1910 Acts and its ruling under *Chevron* that conflicts with precedent of this Court and of the majority of other courts of appeals.

Historical Background. This case has its roots in the settlement of the West and in Congress' efforts at the turn of the century to husband coal to fuel the country's change from an agrarian to an industrial economy.

In the second half of the nineteenth century, Congress sought to develop the vast territory west of the Missouri River that maps of the time "forbiddingly referred to as the 'Great American Desert.'" *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 670 (1979). Accordingly, Congress instituted sweeping changes in the administration of public lands. It granted public lands to those who would build railroads, roads, and canals that would link the West to the East, *id.* at 671-77, and provided free land in fee simple absolute for homesteaders. See Homestead Act, § 2, 12 Stat. 392-93 (1862). Congress also abandoned its traditional practice of reserving mineral lands from public sale. See Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation, in* Paul N. Gates, *History of Public Land Law Development* 699, 706-07 (reprint ed. 1979). In the Mining Law of 1872, Congress authorized the sale of public lands in fee simple to mining claimants at rates of $2.50 to $5.00 per acre. See 30 U.S.C. §§ 29, 30, 37. Coal lands received special treatment, as they had historically. See Swenson, *supra* at 724 & n.181. Congress authorized private entry onto coal

lands in 1864 and again in 1873, setting a maximum limit of 160 acres on individual entry and minimum prices of $10 to $20 per acre. See Act of July 1, 1864, ch. 205, 13 Stat. 343; Act of March 3, 1873, ch. 279, 17 Stat. 607. As under the homestead, land-sale, and mining laws, the coal lands entryman received fee-simple title to the coal land, with no reservation of any part of the mineral estate to the United States.

At the turn of the twentieth century, a "coal famine" struck the West, and concerns rose about the price, supply, and control of the country's primary source of energy. See *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Comm. on Pub. Lands,* 59th Cong. 12-13 (1907) (testimony of Edgar E. Clark, Interstate Commerce Commissioner) ("*Clark Testimony*"). At the same time, widespread fraud in coal-land administration had been uncovered. The Department of Interior had relied largely on affidavits of entrymen as to the mineral or nonmineral character of lands. *Clark Testimony,* at 1-3. Unwilling to pay the steep prices for coal lands set in the 1873 Act or to abide by the Act's acreage limitations, companies (especially railroads) connived to have individuals falsify affidavits and claim lands under homestead or other land laws for a pittance, and then turn the land over to the companies. Carl J. Mayer & George A. Riley, *Public Domain, Private Dominion* 117 (1985). Most of the coal lands that passed into private hands between 1873 and 1906 were not properly patented under the 1873 Coal Land Act. *Id.; Clark Testimony,* at 6. President Roosevelt responded in 1906 by withdrawing 66 million acres of land containing "workable coal" from entry and transfer under the homestead and other land laws. Swenson, *supra,* at 726-27.

The Coal Land Acts of 1909 and 1910. Roosevelt's order prompted an outcry from western interests concerned about its impact on settlers. See 43 Cong. Rec. 2504 (1909) (statement of Rep. Mondell); Swenson, *supra,* at 726-27. For three years after Roosevelt's order, Congress struggled to reconcile the competing interests of promoting settlement and retaining federal control of coal. A number of bills were introduced that would have taken the novel step of severing the surface and mineral estates, some of which specifically would have reserved "natural gas" as well as "coal" to the United States in public lands.[2]

Compromise was finally struck on the last day of Roosevelt's presidency in the Coal Land Act of 1909, Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81) ("1909 Act"). The 1909 Act authorized the issuance of patents to "any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal," upon proof of compliance with those land laws. 30 U.S.C. § 81. The Act, however, mandated that the patent "shall contain a reservation to the United States of all *coal* in said lands, and the right to prospect for, mine, and remove the same." *Id.* (emphasis added). The Act preserved the right of the patentee to "mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit." *Id.*

In debate over the 1909 Act, Representative Mondell of Wyoming, chairman of the House Public Lands Committee, explained that the Act "is the first legislation before Congress providing for a limited patent, or a patent reserving the mineral. It is necessary in the opinion of our committee by reason of the conditions that exist."

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[2] *See* 41 Cong. Rec. 630 (1907) (bill by Rep. Volstead "reserving coal, lignite, petroleum, and natural-gas deposits from disposal . . . under existing land laws"); *id.* at 1483-84 (bill by Sen. LaFollette "reserving from entry and sale the mineral rights to coal and other materials mined for fuel, oil, gas, or asphalt" while providing for sale of the surface lands); *id.* at 1788 (bill by Sen. Nelson "to provide for the reservation of the coal, lignite, oil, and natural gas in the public lands").

43 Cong. Rec. 2504 (1909). The Committee had discussed at length whether to reserve other minerals, Rep. Mondell acknowledged, but it determined that the limited reservation of coal "is quite a sufficient departure from the past practice of the Government" and "as far as we will go in th[e] direction" of issuing limited patents. *Id.*

Although the 1909 Act addressed the rights of persons who had entered coal lands in the past, Congress remained concerned that the prohibitive price of coal lands deterred new settlement. See 45 Cong. Rec. 6042 (1910) (statement of Rep. Mondell); H.R. Rep. No. 61-377 (1910). Congress passed in 1910 a parallel Act that authorized patents for new entrymen under nonmineral land laws, and contained an identical reservation of coal to the United States. Act of June 22, 1910, ch. 318, 36 Stat. 583 (codified by section at 30 U.S.C. §§ 83-85) ("1910 Act"). Congress again rejected calls to broaden the reservation to other minerals, including gas.[3]

Natural Gas in Coal Formations. Even though Congress declined to reserve natural gas in the 1909 and 1910 Acts, thus allowing the entire natural gas estate to pass to the patentee, the issue in this case is whether its reservation of "coal" encompasses natural gas found in coalbeds. Such gas is referred to in the trade as "coalbed methane" (CBM), but that is a misnomer, for like any natural gas it is a mixture of methane and small amounts of other gases. See James E. Fassett, *Coal-Bed Methane—A Contumacious, Free-Spirited Bride; The Geologic Handmaiden of Coal Beds, in Energy Frontiers in the Rockies* 131, 132 (John C. Lorenz et al. eds., 1989); B.P. Tissot & D.H. Welte, *Petroleum Formation & Occurrence* 199 (2d ed. 1984). Natural gas is formed from the chemical breakdown of organic matter that is exposed to microorganisms and high temperatures during its pro-

[3] H.R. Rep. No. 61-377, at 5 (1910) (letter from Secretary of Interior Ballinger); 45 Cong. Rec. 6044 (1910) (statement of Rep. Stephens).

gressive burial under the earth's surface. *Id.* at 71-79, 201-18. "[T]he same geological processes of bacterial action, burial, compaction, and geothermal heating" that produce oil and natural gas also produce coal and natural gas. *Id.* at 229. Methane and other gases are chemically separated from the coal over periods of millions of years as organic matter is converted into coals of increasing carbon content ("coalification"). *Id.* at 247. Because coalification yields a coal rock that is permeable and porous, the coal also acts as a reservoir for the gas that is produced, Fassett, *supra*, at 132, as well as for gas migrating from other formations. Coal is not unique in this respect; carbonaceous shales, for example, also are both the source and the reservoir of natural gas.[4] Even so, coalification generates far more methane than can be stored in the coal itself; indeed, most of the methane generated (over 90% for some coals) escapes from the coalbed, Tissot & Welte, *supra*, at 248, and is often trapped in other reservoir rock.

The 1981 Solicitor's Opinion on Coalbed Gas Rights in Federal Lands. Coalbed gas, historically known as "marsh gas" or "fire damp," had long been regarded as a deadly hazard for coal miners (as well as many a canary). Fassett, *supra*, at 131. In the 1970's, however, scientists came to recognize coalbed gas as a potentially significant commercial resource. See, *e.g.*, M. Deul & A. Kim, *Coalbed Gas: A Source of Natural Gas*, Oil & Gas J., June 16, 1975, at 47. In the aftermath of the Arab oil embargo of that decade, the federal government began to promote the production of fuels that were expensive to produce (like gas from "tight sands" or coalbeds) through grants, see, *e.g.*, 42 U.S.C. §§ 5901-15, and substantial tax credits, see 26 U.S.C. § 29.

[4] *See* Robert C. Milici, *Autogenic Gas (Self Sourced) From Shales —An Example From the Appalachian Basin, in The Future of Energy Gases* 253, 256 (U.S.G.S. Prof. Paper 1570, David G. Howell, ed. 1993).

Because extensive coalbed gas reserves are found in the millions of acres of lands covered by the 1909 and 1910 Acts, the question of title to coalbed gas came before the Department of Interior in its capacity as the agency that administers the 1909 and 1910 Acts. In that capacity, Interior determines whether lands are valuable for coal and issues patents reserving coal in those lands, 30 U.S.C. §§ 81, 83, 85; 43 C.F.R. § 2093.1-3; adjudicates disputes arising under those patents, cf. 43 C.F.R. §§ 4.1, 4.450-1; and leases the reserved coal under the Mineral Leasing Act of 1920, 30 U.S.C. § 201. Although most of the patents were issued in the first half of this century, the Department continues to this day to issue land patents reserving coal under the 1909 and 1910 Acts. See *Public Lands Statistics* 54-55 (1997).

In 1981, the Solicitor of Interior issued an opinion that the reservation of "coal" to the United States in the 1909 and 1910 Acts did not include coalbed gas. *Ownership of And Right to Extract Coalbed Gas in Federal Coal Deposits* (M-36935), 88 Interior Dec. 538 (1981) (App. 140a, 143a). Under internal departmental rules issued by the Secretary of Interior, such published opinions represent the Department's "final legal interpretations . . . on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Under Secretary, or the Secretary." Department of Interior, Departmental Manual 209 DM § 3.2(11) (App. 180a).

Drawing on Departmental expertise in mineral resources, the Solicitor first determined that "[c]oalbed methane is both scientifically defined and legally regarded as a gas," and that coal and CBM "are distinct, and are potentially severable." App. 143a-144a. Carefully examining the legislative history recounted above, the Solicitor determined that "[t]he statutory language and the legislative history belie the argument that Congress intended to reserve any mineral other than coal in the 1909 and 1910 Acts." App. 147a. Subsequent statutes confirmed the narrowness of the reservation, among them the Act of July 17, 1914, 30 U.S.C. §§ 121-123 ("1914 Act"), that separately reserved "gas" to the United States on lands subject to that Act,[5] and legislation in 1933 and 1955 that treated coal and other reserved minerals as distinct from the unreserved minerals they host. App. 147a-149a. Finally, the Secretary found that under the Mineral Leasing Act, coalbed gas fit the definition of "gas" in Department of Interior regulations. It therefore belonged to the holder of a federal oil and gas lease and not to the holder of a coal lease, and was properly governed by oil and gas leasing regulations. App. 152a-159a. In reliance on the Solicitor's 1981 opinion, which expressly states that its purpose was to "expedite" coalbed gas development, App. 142a, gas producers throughout the country entered into leases with the owners of the gas estate, making significant capital investments, and a boom in coalbed gas production ensued. See *infra* at 24-25.

This Litigation. The Tribe abandoned its aboriginal lands in the nineteenth century and relocated to a reservation in Colorado along with other Ute tribes. After the infamous "Meeker Massacre" of settlers by members of a different Ute tribe, Congress in 1880 extinguished all tribal ownership of reservation lands, resettled the Tribe to unoccupied lands along the La Plata River, allotted lands to individual Indians, and provided for the remainder to be ceded back to the United States. See *United States v. Southern Ute Tribe*, 402 U.S. 159, 161-65 (1971). Many of those ceded, non-allotted lands were patented to settlers under various public land laws, subject after the 1909 and 1910 Acts to a reservation of coal to the United States. In 1938, pursuant to a statute that authorized restoration of tribal ownership of reservation lands (with-

[5] The Solicitor expressly determined that coalbed gas was reserved as "gas" in lands patented under the 1914 Act that were classified as valuable for gas. App. 151a-152a.

out impairment of any existing rights to the land), the Department of Interior conveyed equitable title to the Tribe in approximately 450,000 acres where no homestead had been established and 200,000 acres of coal that had been reserved to the United States under the 1909 and 1910 Acts. As a result of these transfers, "the Tribe's reservation is a checkerboard" of Indian and non-Indian lands, App. 109a-110a; a tract in which the Tribe owns the surface and all minerals often is adjacent to another in which the Tribe owns only the coal: the surface and other minerals have been patented to settlers.

The Southern Ute reservation is located within the San Juan Basin, which is the leading CBM-producing basin in the West. Cf. App. 181a (map of major coalbed gas reserves). In reliance on the 1981 Solicitor's opinion, oil and gas companies entered into leases to produce coalbed gas with individual landowners holding title under 1909 and 1910 Act patents to the more than 200,000 acres where the Tribe owned only the coal. In tribal lands, the Tribe issued oil and gas leases to the same producers for coalbed gas production. The Tribe pooled its lands with non-Indian fee lands in communitization agreements and granted rights of way across tribal lands and roads, sharing royalties for the coalbed gas with the fee owners.

Its conduct notwithstanding, in 1991 the Tribe brought this action in federal district court in Colorado against petitioners, royalty owners and producers under leases covering the 200,000 acres where the Tribe owned the coal, as well as various federal officials responsible for land held in trust for the Tribe. The Tribe alleged that Congress' reservation of "coal" to the United States in lands patented under the 1909 and 1910 Acts included natural gas in coal formations, and therefore it owned the gas pursuant to the transfer of federal interests in coal to the Tribe in 1938. The Tribe sought, among other things, a declaration to that effect and an award of dam-

ages against petitioners for trespass, conversion, and unpaid tribal taxes.

In 1992, the district court certified a class of nonfederal defendants (naming Amoco as class representative), and in 1994 it awarded summary judgment to the class and the federal defendants on the basis of its interpretation of the plain meaning of the term "coal" in the 1909 and 1910 Acts. App. 99a. The district court reviewed dictionaries from the early Twentieth Century that uniformly defined coal as a solid, but held that in any event "common sense dictates that in 1909 and 1910, Congress intended 'coal' to mean the solid rock substance." App. 112a-114a. Given that the Acts did not once mention "gas" or "constituents" of coal, the district court stated that "it would require not merely some, but herculean ingenuity to create ambiguity in the 1909 and 1910 Acts." App. 115a.

Examining the legislative history, the district court concluded that Congress meant "to depart in the most narrow way possible from the historic practice of the United States to grant fee simple absolute title to homesteaders," and reserved only the solid rock coal "to insure an adequate source of the nation's primary energy resource." App. 123a-124a. The district court also found significant that the 1914 Act separately reserved "gas" and other named minerals on lands valuable for those minerals, and that it was not until the Homestead Act of 1916 that Congress broadly reserved "all the coal and other minerals," 43 U.S.C. § 299, in patented lands. App. 124a-127a. Even if ambiguity could be wrung from the term "coal," the district court held in the alternative, the 1981 Solicitor's opinion was entitled to *Chevron* deference. App. 128a-129a.

On appeal, the Tenth Circuit reversed. A panel of the court held that the term "coal" was ambiguous, that the 1981 Solicitor's opinion was not entitled to *Chevron* deference in resolving that ambiguity, and that the ambiguity should be resolved against the grantee so that no public

land passed by implication. App. 52a-94a. The court granted rehearing *en banc* limited to the question of whether the term "coal" in the 1909 and 1910 Acts "unambiguously excludes or includes CBM." App. 8a. By a 6-3 decision, with 4 judges recused, the court *en banc* agreed with the panel that the 1909 and 1910 Acts were ambiguous, and adopted the panel opinion with modifications. App. 8a-10a.

The *en banc* court began its analysis, before it even addressed the text of the 1909 and 1910 Acts, with the admonition that "[o]f critical importance is the long recognized principle of statutory construction, applicable here, that ambiguity or uncertainty in the terms employed in land grants should be resolved in favor of the government." App. 10a-11a (quotation and brackets omitted). The court then summarily dispensed with an analysis of the statutory language, claiming that because "[the] Acts neither define coal nor mention CBM," therefore "the statutes do not by their plain language indicate congressional intent regarding CBM." App. 14a.

The court then undertook to divine "Congress' specific intent to include or exclude CBM in its reservation of coal." App. 14a. Relying on what it believed were ambiguous discussions of coal's chemical composition in contemporary texts, and on modern scientific findings that *in situ* most CBM is molecularly attracted to the surface of the coal in a state of "adsorption," the court concluded that "CBM is not sufficiently like other natural gases for us to conclude that Congress in 1909 unambiguously intended the owners of other natural gases to also own CBM associated with the reserved coal." App. 18a-19a. Because CBM was regarded as a waste product that at the time could only be extracted by damaging the coal, the court doubted that Congress formed "a specific intent to convey CBM as a gas." App. 24a. The court found present-day exploitation of CBM by the coal owner to be consistent with Congress' "general intent" to reserve all coal that may have future economic value. App. 32a.

Having determined that the term "coal" in the 1909 and 1910 Acts "neither unambiguously includes or excludes coalbed methane," the court of appeals resorted to the presumption that doubts respecting land grants are resolved in favor of the government, and held that the reservation of coal "includes the adsorbed CBM." App. 32a-33a. The court specifically declined to "address ownership of CBM that may have migrated away from the coal into adjacent non-coal strata." App. 18a n.8.

The *en banc* court left undisturbed the panel's decision that, even though the 1909 and 1910 Acts were held to be ambiguous, the Solicitor's 1981 opinion was not entitled to *Chevron* deference in resolving that ambiguity. App. 10a. In the panel opinion, the court held that it would not pay deference "to agency policies promulgated in formats other than legislative rules or adjudications." App. 84a. Though acknowledging that internal Interior rules provided that published Solicitor opinions of this kind are binding, the court ruled that *Chevron* did not apply to statutory interpretations issued without the "procedural protections" of notice-and-comment rulemaking. App. 87a.

Judge Tacha, joined by Judges Anderson and Baldock, dissented from the *en banc* decision. Judge Tacha pointed out that "coal" was uniformly defined in dictionaries of the time as a solid rock fuel, and "it is extremely unlikely . . . that a people as familiar with CBM gas as the people of 1909 would define coal as a 'solid' if they also thought of CBM gas as coal." App. 37a. Because CBM's status as a waste product makes its ownership undesirable, "one would not expect the United States to reserve it," underscoring that Congress did no more than reserve the solid rock fuel known as coal. App. 39a. Judge Tacha faulted the majority for its "central interpretive error" of deducing that the failure of the statutes to define "coal" or mention CBM creates ambiguity as to whether Congress reserved CBM to the United States. "Silence does not equate with ambiguity." App. 39a-40a.

Judge Tacha further criticized the majority for inferring that Congress would have distinguished between the CBM remaining in the coalbed and the 90 percent of coalbed gas that strays into adjacent rock. App. 40a-41a. She also dismissed the majority's claim that CBM's adsorption to the pores of the solid coal is of legal relevance. "Physical sorption occurs between gases of all types and solids," and involves the same pervasive forces of molecular attraction that bind paper to the table on which it sits. App. 43a. Finally, the majority's claim that CBM could not be extracted without damaging the coal, even if true, has no bearing on the issue of ownership. Where split estates are at issue, the common law has always distinguished between ownership and the right of extraction, and the rule of accommodation has always permitted the owner of other minerals to extract them so long as "he does not unreasonably damage the coal." App. 47a. Coal has a plain and ordinary meaning in the 1909 and 1910 Acts that does not encompass coalbed gas. App. 50a-51a.

REASONS FOR GRANTING THE PETITION

The court of appeals below committed fundamental error in interpreting important public lands statutes, thereby upsetting settled expectations of property rights in natural gas worth billions of dollars. In construing the reservation in the 1909 and 1910 Acts to the United States of "coal" to include marsh gas (now known as CBM), the Tenth Circuit ruled that the Acts had no plain meaning because they did not define the everyday term "coal." The court brushed aside clear evidence that Congress intended only to reserve the solid rock fuel commonly known as coal: namely, the fact that Congress had never before reserved any mineral to the United States in a land patent; had rejected proposals to reserve other minerals (including natural gas) to the United States; and reserved coal only in response to a crisis in the supply of this solid rock fuel and concern about its fraudulent accumulation by railroads and other commercial in-

terests. The court further presumed without evidence that Congress established ownership of gas based on its subsurface location, a concept foreign to basic minerals law and unworkable in practice. Thus, violating basic principles of statutory construction, the court bent over backwards to find ambiguity where none exists. The court of appeals compounded its error by refusing to grant *Chevron* deference to the Department of Interior's interpretation of the statute in the 1981 Solicitor's opinion to resolve the purported ambiguity, improperly limiting *Chevron* to legislative rules and adjudications despite precedent of this Court to the contrary.

This case presents multiple, compelling reasons for this Court to grant certiorari. On the important issue of whether *Chevron* deference should only be paid to agency interpretations embodied in legislative rules or agency adjudications, there is a 4-8 split in the courts of appeals that this Court should resolve. Circuit split aside, the ownership of coalbed gas in the more than 20 million acres of lands patented under the 1909, 1910, and related Acts is an important question of federal law that this Court should settle now.

The ruling below has created untenable title uncertainty in coalbed gas worth billions of dollars. It has disrupted production of this critical energy resource because new development will not be undertaken when title is uncertain. The disruption was so severe in Wyoming that Congress, though not addressing many of the major effects of the ruling, responded quickly by passing an Act intended to provide limited relief for producers and royalty owners under certain existing leases. In addition, the decision below has created immediate financial hardship for individual landowners and small producers and sown confusion in federal, state, and local taxation of coalbed gas (in particular entitlement to major federal tax credits for nonconventional fuel development). This Court should grant certiorari to consider this question of paramount national importance.

I. THE COURT OF APPEALS FUNDAMENTALLY MISINTERPRETED MAJOR PUBLIC LANDS STATUTES.

In statutory construction, "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). Few terms would have been better understood in common parlance in 1909 than the word "coal," the solid rock fuel that was the country's primary energy resource at the turn of the century. See Sam H. Schurr et al., *Energy in the American Economy—1850-1975*, at 64, 68-69 (1960).

Dictionaries of the time establish plain meaning, see *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 508-09 (1981), and predictably they uniformly define coal as a solid distinct from marsh gas.[6] But as the district court found, it is not necessary to resort to dictionaries when the meaning of a statutory term is clear as a matter of common sense. App. 114a. Common sense dictates, as this Court has recognized, that natural gas, a fugacious mineral, "differ[s] from solids in place such as coal." *Champlin Ref. Co.* v. *Corporation Comm'n*, 286 U.S. 210, 232 (1932); see also *United States* v. *Buffalo Natural Gas Fuel Co.*, 172 U.S. 339, 342 (1899) (relying on testimony that the statutory term "crude bitumen" encompassed many distinct substances, including those that are "gaseous, as natural gas or marsh gas" and those that are "solid, as . . . bituminous or anthracite coal"). Furthermore, it defies common sense to infer that Congress intended to reserve marsh gas—a known hazard and waste product of coal mining with no contemplated present or future value—while it passed to the patentee all noncoal minerals in the land, including *precious* minerals like oil.

[6] *See, e.g.*, *The Universal Encyclopaedic Dictionary* 945, 2637 (1905) (defining "coal" as "a stratified rock" and separately defining "marsh gas" as "a hydrocarbon gas very abundant in nature"); *American Dictionary of the English Language* 244 (1889) (coal is a "solid, combustible substance"); II *A New English Dictionary* 549 (1893) (coal is "a mineral, solid, hard, opaque").

The court of appeals nonetheless reached this result by breaching the most fundamental tenets of statutory construction. It stated at the outset, before it had even analyzed the statutory text, that "[o]f critical importance" to this case is the canon that ambiguity in public land grants is resolved in the favor of the sovereign, and that "[t]he burden remains on defendants to dispel any ambiguity in the construction of the coal reservation." App. 10a-11a. But this Court has admonished that rules for resolving statutory ambiguity "come[] into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (rule of lenity); *Chevron*, 467 U.S. at 842-43 & n.9 (agency deference).

Moreover, as this Court stated just last Term, discussing the rule of lenity: "The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998). Tiebreaking presumptions are only invoked "if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Id.* (quotation marks omitted). This Court has consistently emphasized this same principle in land-grant cases, declaring that "the well-settled rule of this court that public grants are construed strictly against the grantees" does not mean that such grants are "to be construed to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication." *Leo Sheep*, 440 U.S. at 682-83 (quotation omitted).

The court of appeals aggravated its error by refusing to give the term "coal" its plain meaning, reasoning that

because the "1909 and 1910 Acts neither define nor mention CBM[,] . . . the statutes do not by their plain language indicate congressional intent regarding CBM." App. 14a. But the absence of any definition addressing CBM does not entitle a court to disregard the plain meaning of the term "coal." Quite the contrary, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). As Judge Tacha aptly put it in dissent, "Silence does not equate with ambiguity." App. 40a.

Although the meaning of "coal" is clear as day, the Tenth Circuit purported to find ambiguity based on discussions of the chemical composition of coal in certain contemporary texts. Aside from the errors in the Tenth Circuit's chemical analysis,[7] this Court has held that the

[7] The court of appeals misread these texts, illustrating the pitfalls of a court's unguided foray into scientific analysis, particularly if the effort is result-oriented. First, the Tenth Circuit relied on a dictionary description of coal as an "amorphous" substance consisting of "hydrocarbons" as support for its claim that "coal" was understood at the time to include methane gas. App. 16a. But that very dictionary defines "amorphous" as a term indicating that a *solid* (such as coal) lacks a crystalline structure. *Funk & Wagnalls New Standard Dictionary of the English Language* 94 (1913). Furthermore, solid coals are composed of many different hydrocarbons. *Coal Handbook* 11 (Robert A. Meyers, ed. 1981). There is no basis for the court's suggestion that a reference to "hydrocarbons" in "amorphous" coal is a reference to methane gas. Certainly the author of that entry did not understand coal to include gas; the next sentence (omitted by the Tenth Circuit) describes coal as "brittle, compact, massive, and sometimes laminated . . . ." *Funk & Wagnalls* at 508. Second, the Tenth Circuit adverted to a description of gas as "occluded" within coal. App. 17a. But the term "occluded" was the standard usage to indicate that a porous solid absorbed gas, *see id.* at 1706, and does not suggest that anyone conceived of the coalbed gas as coal itself. Third, the court relied on a discussion that hydrogen predominates among the "gaseous" constituents of coal. App. 17a; IV *American Cyclopaedia* 726 (1873). But the Tenth Circuit does not reveal that the encyclopedia is discussing bituminous caking coal, and is simply reciting the well known fact that in its atomic structure this low-rank *solid* coal has more hydrogen (a gas at normal atmospheric conditions) than higher ranks of coal like anthracite. *See id.* at 728; *Coal Handbook* at 11. It is not referring to CBM. Nothing in the contemporaneous sources relied on by the court of appeals gives the slightest indication that their authors would have defined the term "coal" to include coalbed gas, much less that Congress did so.

meaning of mineral reservations in federal statutes cannot be determined by esoteric scientific definition. In *Burke* v. *Southern Pac. R.R. Co.*, 234 U.S. 669 (1914), this Court, confronted with the question of whether a reservation of "mineral lands" included petroleum lands, was "asked to give effect to the strictly scientific view that petroleum is a resultant of the decomposition of organic matter . . . and therefore is not a mineral." *Id.* at 679. This Court assumed that oil was not a mineral in the scientific sense, but held that a "strictly scientific" definition "is not the test contemplated by the statute." *Id.* Congress "was dealing with a practical subject in a practical way, and we think it used the words 'mineral lands,' and intended that they should be applied, in their ordinary and popular sense." *Id.*

As the legislative history and context of the 1909 and 1910 Acts make clear, Congress was again "dealing with a practical subject in a practical way," and that practical subject was the ownership and control of *solid* coal. The lands at issue were classified as "coal lands" on the basis of the presence of certain kinds of solid coal, and classification was carried out on "air-dried" (*i.e.*, gas-free) samples of solid coal. *Classification and Valuation of Coal Lands*, 37 Pub. Lands Dec. 653 (1909) (App. 137a). Congress passed the 1909 and 1910 Acts as a practical response to a crisis in the supply of solid coal, fraudulent misclassification of lands containing valuable solid coal, and the danger of monopolization of solid coal by commercial interests. It considered and rejected bills and proposed revisions that would specifically have reserved

"gas" and other precious minerals to the United States, departing from the historic practice of granting fee-simple patents only to the extent necessary to meet the crisis at hand. See *supra* at 4-6. Congress also understood that it was creating property interests in gas, oil, and other minerals that would be leased or otherwise alienated by the patentee, and it would have defined the term "coal" if it had meant anything but its popular signification.[8] App. 37a (Tacha, J., dissenting).

Furthermore, a reservation of CBM in coalbeds is irreconcilable with the grant (undisputed by the Tribe or the court of appeals) to the patentee of the natural gas obtainable from coal lands. Unlike fixed minerals like coal, title to gas is not established by subsurface location, *Champlin Refining*, 286 U.S. at 233; under the rule of capture, the producer is entitled to all gas that flows through the well bore. *Brown* v. *Spillman*, 155 U.S. 665, 669-70 (1895). Congress cannot be presumed to have defined ownership of gas based on its subsurface location (CBM remaining in the coalbed), a concept foreign to basic minerals law. This is especially so if the Acts are given a practical construction under *Burke*; there are no chemical markers to distinguish the CBM that comes from

[8] The 1909 and 1910 Acts must be interpreted *in pari materia* with the Mineral Leasing Act, ch. 85, 41 Stat. 437 (1920), 30 U.S.C. § 182 ("MLA"), which provides for the disposition of reserved coal. *See Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 57-59 (1983). From its inception, the MLA has treated the reserved coal as a solid, providing for its leasing on a cent-per-ton basis, 41 Stat. 439, and making no mention of or provision for CBM. Indeed, the Act as revised refers to coal as a "nongaseous hydrocarbon substance[]." 30 U.S.C. § 181. As the Tribe conceded below, CBM is clearly "gas" and not "coal" under longstanding federal leasing regulations. *Compare* 30 C.F.R. § 700.5 (defining "coal" as "combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite") & *id.* § 206.251 (similar) *with id.* § 206.151 (defining "gas" as "any fluid, either combustible or noncombustible," that is produced in a natural state from the earth and that "maintains a gaseous or rarefied state under standard temperature and pressure conditions").

the coalbed from CBM in adjacent strata or other natural gas that flows through the well bore. Congress simply would not have created the unworkable split gas estate concocted by the court of appeals.[9] The only practical interpretation of the 1909 and 1910 Acts is that the reservation of "coal" referred to the solid rock fuel commonly known by that name. No ambiguity whatsoever exists in the statutory reservations, much less a "grievous ambiguity," *Muscarello*, 118 S. Ct. at 1919, that would justify application of the presumption of construing public grants against the grantee.

II. THIS COURT SHOULD RESOLVE A DEEP SPLIT IN THE CIRCUITS OVER A LIMITATION ON *CHEVRON* DEFERENCE THAT IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS OF OTHER COURTS OF APPEALS

Even if there were any ambiguity in the statutes, the court of appeals should have deferred under *Chevron* to the 1981 opinion of the Solicitor of Interior. The court of appeals refused to do so, holding categorically that "agency policies promulgated in formats other than legislative rules or adjudications" are not entitled to *Chevron* deference. App. 84a. Solicitor's opinions of this kind, even though binding and final agency interpretations of a statute under internal Department rules, lack the "proce-

[9] Like certain state and district court decisions on which it relied, App. 21a-24a, the Tenth Circuit fundamentally misunderstood the mining law concept of "ownership" of oil and gas *in situ*. As this Court clarified long ago, that concept does not connote title in the same sense that one has title to a fixed mineral like coal, but rather "the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of the land." *Ohio Oil Co.* v. *Indiana (No. 1)*, 177 U.S. 190, 209 (1900). Absent severance of the oil and gas estate, such a right is vested "in the owners in fee of the surface of the earth within the area of the gas field." *Id.* The Tenth Circuit's novel analysis, awarding title to natural gas to the owner of the subsurface reservoir, will if unchecked breed litigation and upset settled expectations regarding the ownership of gas in reservoirs similar to coal, such as shales.

dural protections" of notice-and-comment rulemaking that are absolutely necessary for *Chevron* deference, the court declared. App. 87a.

The court's ruling is squarely in conflict with precedent of this Court, most notably *Pension Benefit Guaranty Corporation* v. *LTV Corporation*, 496 U.S. 633, 647-52 (1990), which accorded *Chevron* deference to statutory interpretations embodied in agency opinion letters. Indeed, this Court has never limited *Chevron* deference to legislative rules or adjudications or interpretations that were otherwise subject to notice-and-comment procedures. Rather, it has consistently looked to see whether the agency had adopted an official position in the exercise of delegated statutory powers, either by taking action based on its interpretation of the statute or by issuing a "binding policy pronouncement" to govern future agency action, *Metropolitan Stevedore Co.* v. *Rambo*, 117 S. Ct. 1953, 1963 n.9 (1997).[10] Because deference is warranted whenever the agency interpretation "reflects the agency's fair and considered judgment on the matter in question," *Auer* v. *Robbins*, 117 S. Ct. 905, 912 (1997) (position stated in legal brief), it is perverse to deny that deference to the format—formal legal opinions—where agency statutory analysis is the most rigorous.

Despite the consistency of this Court's precedent, a 4-8 split has emerged among the circuits as to whether *Chevron* deference should be limited to legislative rules or adjudications. Joining the Tenth Circuit in favor of the limitation are the Second, Sixth, and Federal Circuits.[11] On

[10] *See Reno* v. *Koray*, 515 U.S. 50, 61 (1995); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233-39 (1986); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 981-84 (1986).

[11] *Motor Vehicles Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 534-35 (2d Cir. 1994); *Reich* v. *New York*, 3 F.3d 581, 587 (2d Cir. 1993); *Kelley* v. *E.I. DuPont De Nemours & Co.*, 17 F.3d 836, 841-42 (6th Cir. 1994); *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992).

the other side are the Third (with whom the Tenth Circuit expressly acknowledged a split, App. 86a n.24), Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits.[12] Given the vital importance of *Chevron* to the proper interpretation of federal statutes, and the need for regulated entities to be able to rely upon agency interpretations, this Court should grant certiorari to resolve this mature and unresolved split on a recurring issue of significance.

III. THE IMPORTANT NATIONAL QUESTION OF OWNERSHIP OF NATURAL GAS IN COAL MUST BE RESOLVED NOW TO AVOID INDUSTRY DISRUPTION AND PROFOUND UNCERTAINTY AND HARDSHIP.

In *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1982), this Court granted certiorari on the question whether gravel was included in the reservation to the United States of "coal and other minerals" in the Stock-Raising Homestead Act of 1916 "in view of the importance of the case to the administration of more than 33 million acres of land patented" thereunder. *Id.* at 42. This case is a far more important public-lands case than *Western Nuclear* and involves far more valuable minerals. The

[12] *See, e.g., Elizabeth Blackwell Health Ctr. for Women* v. *Knoll*, 61 F.3d 170, 181-82 (3d Cir. 1995) (HCFA directive to state Medicaid programs); *Hicks* v. *Cantrell*, 803 F.2d 789, 793-94 & n.4 (4th Cir. 1986) (DOL regional administrator's letter); *Garvey Properties* v. *First Fin. S. & L. Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (FHLBB general counsel opinion letter); *Wisconsin Dep't of Health* v. *Bowen*, 797 F.2d 391, 397-98 (7th Cir. 1986) (Medicaid Action Transmittal); *Thorson* v. *Gemini, Inc.*, 123 F.3d 1140, 1141 (8th Cir. 1997) (Secretary of Labor's opinion letters); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (Regional Solicitor of Interior's opinion); *Herman* v. *Nationsbank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997) (Secretary of Labor's opinion letters); *Tax Analysts* v. *IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (IRS interpretation of statute stated in legal brief defending denial of FOIA request); *Health Ins. Ass'n* v. *Shalala*, 23 F.3d 412, 424 & n.8 (D.C. Cir. 1994) (Medicare interpretive rules).

Tenth Circuit's ruling determines ownership of gas worth billions of dollars; disrupts production and investment in an important national energy resource by creating title and investment uncertainty; causes severe financial hardship borne not just by large oil and gas companies but by small producers and individuals; and creates legal uncertainty in the taxation of CBM production.

The issue of law decided by the Tenth Circuit affects ownership of natural gas in more than 20 million acres of land (predominantly but not exclusively in the West) patented under the 1909, 1910, and 1914 Acts.[13] Because of acreage limitations in the nonmineral land laws under which coal lands were entered, the number of property holders affected is vast. At least 128,500 patents have been issued under the three Acts, and property rights in those patents have been fractionated over the years by intergenerational and other transfers.

Lands patented under these Acts fall within the most critical areas for CBM exploration and development in the country—among them the San Juan, Powder River, Uintah, Green River, Piceance, and Black Warrior basins. See App. 181a (Map); cf. Fassett, *supra*, at 134-44. CBM is one of the nation's most important emerging energy resources. Even at this early stage of its development, CBM represents more than 5% of the nation's proved gas reserves and almost 15% of potential reserves (about as much as Outer Continental Shelf reserves). See Richard A. Schraufnagel & Paul S. Schafer, *The Success of Coalbed Methane, in A Guide to Coalbed Methane*

[13] The 1914 Act reserved "gas" to the United States in patented lands classified as valuable for that mineral. 30 U.S.C. § 121. If CBM is "coal" and not "gas," then it would belong to the 1914 Act patentee (unless the 1909 or 1910 Act also applied) and no longer to the United States or its successor as owner of the gas estate. Of the more than 20 million acres affected, 16.25 million acres have been patented under the 1909 and 1910 Acts, and another 4.35 million acres under the 1914 Act. *Public Lands Statistics* 55 (1997).

Reservoir Engineering 1.1 (1995); Potential Gas Committee, Colorado School of Mines, *Potential Supply of Natural Gas in the United States* 11, 13 (1997). CBM production skyrocketed after the 1981 Solicitor's opinion seemingly settled the issue of title; the number of producing CBM wells grew from 515 in 1987 to 6300 in 1994. Schraufnagel & Schafer, *supra*, at 1.1-1.2.

The Tenth Circuit ruling put this industry in immediate jeopardy. Because coalbed gas is produced under oil and gas leases secured from the owner of the gas estate, not the coal estate, gas producers were subject to claims of trespass throughout the country, and royalty owners to claims of conversion of property belonging to the United States or its successors in interest. Coalbed gas revenues were placed in escrow, inflicting immediate hardship on royalty owners and small, highly leveraged producers. Multimillion-dollar investment deals were suspended. The disruption provoked Congress, within three months of the judgment below, to pass a law intended to afford parties to existing leases the limited relief that the United States, where it still owned the coal, would forbear from bringing claims against them asserting infringement of federal ownership rights. P.L. No. 105-367, § 1(a) & (b)(3), 112 Stat. 3313 (1998) ("Enzi Act").[14]

Although it is doubtful whether the Enzi Act provides even the limited security intended,[15] it does not address

[14] Separate provisions of the Enzi Act expressly limit its reach. The Act specifically provides that the United States does not waive any rights with respect to coalbed methane production unless it is from lands subject to a valid contract or lease in effect as of the date of enactment or by a landowner who has filed for a permit on or before that date to drill a well to a completion target in a coal formation. P.L. No. 105-367, § 1(a) & (b)(5). The Act also does not apply to interests in coal transferred to a federally recognized Indian tribe, as here, or to any third party by deed, patent, or other conveyance. *Id.* § 1(b)(3)-(b)(4).

[15] For example, the Act provides no protection against claims by persons other than the United States (such as federal coal lessees),

the fundamental question decided by the Tenth Circuit: title to natural gas worth billions of dollars.[16] No cloud on title of property interests that are this vast can be tolerated because of its inherent impairment of the alienability of so much property. The title uncertainty created by the ruling below is particularly detrimental because it will, if unresolved, retard CBM gas development for years to come. Even if the Enzi Act is construed generously, Congress expressly disclaimed any protection for landowners in the substantial tracts of unleased lands covered by the 1909, 1910, and 1914 Acts; indeed, the Wyoming producers who sought and obtained passage of the Enzi Act have estimated that it affects only about 5% of the lands patented under the three Acts. Unleased lands are critical because of the dynamism of the CBM industry; for example, after the unexpected success of shallow-coal drilling in the Powder River Basin, lands once considered of marginal or no value are now in demand for development. Even so, few producers will pay the substantial lease bonuses typically needed to secure a lease, much less commence production, when title is uncertain. There will be a multiplier effect on lands adjacent to those covered by the 1909, 1910, and 1914 Acts, because often these lands must be developed on an integrated basis to be commercially viable. In important basins that are par-

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and has uncertain application to existing oil-and-gas leases that do not specifically "convey[] rights to explore for, extract, and sell coalbed methane," P.L. No. 105-367 § 1(a)(1)(B). The expected source for guidance on the meaning of the Enzi Act is an opinion of the Solicitor of Interior, but ironically under the Tenth Circuit's *Chevron* ruling any such opinion would not be entitled to deference and could not be relied upon by private parties.

[16] The Tribe has valued its claims just for the 200,000 acres at issue in this case at $1 billion. David Statts, *Tribe Wins Again in Coal-bed Gas Case*, The Durango Herald, July 21, 1998, at 1A. Amoco alone has invested more than $500 million in lease bonuses, exploration, wells, pipelines, processing plants, and other facilities just on the Tribe's reservation.

tially or largely unleased—among them the Powder River, Green River, Piceance, Raton, and Uintah basins—lands that otherwise would be brought into production will be left idle by the Tenth Circuit's decision.

The Tenth Circuit's reversal of the summary judgment entered by the district court also inflicts significant financial hardship on the approximately three thousand farmers and other royalty owners who are named or unnamed class defendants (as well as curtailing production on contested lands). Most royalty payments from contested lands have been escrowed since the panel decision; royalty owners who have leases with Amoco have alone been deprived of access to millions of dollars in escrowed royalties in little over a year. Many royalty owners are elderly and have fixed incomes or small farms, and often are children or grandchildren of the original patentees. They count on royalty income to support them in retirement or to pay for college tuitions or notes on their farm. Electa Draper, *Utes Celebrate Natural-Gas Decision*, Denver Post, July 22, 1998, at 18A. Some landowners in the class have had to sell their farms (or return farm equipment to dealers) because of lack of cash.

Finally, the ruling below creates turmoil in federal, state, and local taxation. In 1980, Congress passed a law providing a tax credit to encourage development of otherwise uneconomic domestic fuel resources. 26 U.S.C. § 29. Participants in San Juan basin development alone have claimed credits worth hundreds of millions of dollars from 1909 and 1910 Act lands; the ruling below raises significant uncertainty as to whether taxpayers throughout the country (including numerous public investors in financial trusts to which such credits were effectively transferred) were entitled to the credits claimed. In addition, even though CBM wells were drilled in reliance on the availability of those credits for CBM pro-

duced through the year 2002, cf. Fassett, *supra*, at 144 (tax credits key to economic viability of CBM wells), the entitlement of taxpayers to those future credits is now in jeopardy.

On the state and local level, the decision threatens dislocation in property, income, sales, and severance tax regimes; different tax regimes apply to coal versus gas, and the taxing entity may not have jurisdiction over a new CBM owner (like the Tribe). This impact will be especially severe in localities like La Plata County, Colorado that derive substantial portions of their tax base from CBM production and will be forced to cut essential services. See Electa Draper, *Utes Irked by County's D.C. Lobbying*, Denver Post, Oct. 5, 1998, at B04.

In summary, the court of appeals, by indefensible statutory analysis and improper disregard of an agency interpretation entitled to deference, has created widespread dislocation in an area where reliance interests are at a premium, necessitating immediate review by this Court.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-1579

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Appellant,

v.

AMOCO PRODUCTION COMPANY; SHIRLEY K. ADAMS; HENRY ASHWORTH; CARLA M. ASPAAS; ERIC K. ASPAAS; HELEN RUTH ASPAAS; LAURA BELLE ASPAAS; LETA M. ADKINS; RITA M. ADKINS; MAXWELL C. ANDERSON; EARL A. BARKER; MAURICE C. BREEN, named as: Heirs of Maurice C. Breen, deceased; HORACE F. BUCHANAN, named as: the Heirs of Horace Buchanan, deceased; GEORGE A. BUGG; CARBONE INVESTMENT COMPANY; JACK CARMACK; ROWLAND CARMACK; JOSEPH C. CIANCIO; WILLIAM KEMP CLARK; COLORADO NATIONAL BANK, George Veto Trust; COLORADO NATIONAL BANK OF LONGMONT, conservator Gladys N. Frazzini; DOROTHY A. CORGIN; KELLY COX, named as: the Heirs of Kelly Cox, deceased; A.B. CROSBY; BARBARA CROSBY; DAVID CROSBY; JOHN CROW, JR.; MARGARET CROW; MANUEL CRUZ; LOUIS M. CUMMINS; FREDERICK E. DICKERSON; J.M. EAKES; ROBERT MCFERRAN EAKES; MARGARET ELLISON; SALLY M. ETTERBECK; MINNIE FLAKS; TILLIE FLAKS; CASSIO FRAZZINI; ADELE FROST; ROBERT GALBASIN; ABEL S. GALLEGOS; MONTEY GARNAND; RUBY GIBBS GOGGANS; CHRISTINE HAMILTON; HARDIN SIMMONS UNIVERSITY; H.A. HARMON, named as: the Heirs of H.A. Harmon, deceased; HONDO OIL & GAS COMPANY, named as: the shareholders of Hondo Oil & Gas Company (dissolved);

HYDE OIL AND GAS CORPORATION; CHARLES KETTERING; FIDEL LUCERO; RICHARD C. MALCOMB; SUZANNE HEATH MANGES; CATHERINE B. MCELVAIN; MABEL MCELVAIN; THORNTON H. MCELVAIN, JR.; DOROTHY N. MCKELVEY; EDWIN L. MCKELVEY; R. FRANKLIN MCKELVEY; W.R. MCMAHON; MCMURRY OIL COMPANY; W. CLAY MEREDITH CHARITABLE TRUST; W.A. MONCRIEF, named as: the Heirs of W.A. Moncrief, deceased; ROY E. MONTGOMERY, personal representative for the Estate of W. Clay Meredith, deceased; FORREST D. MILLER, named as: the Heirs of Forrest D. Miller, deceased; HELEN L. MILLER, named as: the Heirs of Helen L. Miller, deceased; THOMAS S. MORRISSEY; THOMAS J. MORRISSEY; EMIL MOSBACHER; EMIL MOSBACHER, III; JOHN DAVID MOSBACHER; R. BRUCE MOSBACHER; MYRA THERESA MOULDS; NORTH CENTRAL OIL CORPORATION; H.L. OLIVER; CLARA ONOFRIO; MARGARET C. PARGIN; HAROLD F. PAYNE, JR.; NEVILLE G. PENROSE; BEN M. PETERSON, JR.; FREDERICK PETROCCO; PHILLIPS PETROLEUM COMPANY; JAMES M. RAYMOND; W.E. RENNIE, named as: the Heirs of W.E. Rennie, deceased; THOMAS C. ROMOLO; BENTON E. SMULLYEN; CLINTON I. SMULLYEN; WILLIAM STERLING; J.L. TATUM, named as: the Heirs of J.L. Tatum, deceased; ANNA CARLEO TOMEO; ERNEST TOMEO; TURNER SECURITIES; RICHARD W. TURNER, SR.; GEORGE C. VANCE, named as: the Heirs of George C. Vance, deceased; ANTHONY H. VETO; JOSEPH F. WARE, JR.; ALBERT E. ZARLENGO; ANTHONY F. ZARLENGO, John Doe and all other unknown persons claiming an interest in the mineral estate located within the N/2 of section 12, T33N, R8W, N.M.P.M., La Plata County, Colorado; AMAX OIL & GAS, INC.; BOWEN/EDWARDS ASSOCIATES, INC.; FUEL RESOURCES DEVELOPMENT COMPANY; MCKENZIE METHANE CORPORATION; MERIDIAN OIL, INC.; MOBIL OIL CORPORATION; NATIONAL COOPERATIVE REFINERY ASSOCIATION; NORTHWEST PIPELINE CORPORATION; PABLO

OPERATING COMPANY; PALO/EAGLE JOINT VENTURES; RICHMOND PETROLEUM, INC.; WILLIAMS PRODUCTION COMPANY; MANUEL LUJAN, JR., Secretary of the United States Department of the Interior; DEPARTMENT OF INTERIOR, and its subordinate agencies; BUREAU OF INDIAN AFFAIRS; BUREAU OF LAND MANAGEMENT; MINERALS MANAGEMENT SERVICE; EDDIE F. BROWN, Assistant Secretary of the Bureau of Indian Affairs; CATHERINE FRANCES MCELVAIN HARVEY; DELOS CY JAMISON, Director of the Bureau of Land Management; and SCOTT S. SEWELL, Director of the Minerals Management Service; Class of Defendants situated similarly to those named non-governmental defendants who claim ownership of an interest in coalbed methane and other coal constituents or claim the right to explore for, develop or produce those substances from coal or coal strata reserved by the United States in patents issued under the Act of March 3, 1909, or the Act of June 22, 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservation and which class members have not obtained tribal consent to and federal approval of said interests of rights; JACK BALLE; J.M. HUBER CORPORATION, Oil & Gas Division; MARY JEAN BALLE; DONALD C. CIANCIO; SUSIE M. CIANCIO; NCNB TEXAS NATIONAL BANK, as Trustee of the Kelly Cox Testamentary Trust; ADDIE G. CROSBY; JACK W. CROSLAND, JR.; HENRY L. ENOCHSON; MARY JANE ENOCHSON; J.L. GOGGANS; LIBERTY TULSA, as trustee of the Christine J. Hamilton Trust; HELEN CROSLAND HENDRICKS; THOMAS L. JOHNSTONE; JAMES ERIC KAINDL; LARRY JAMES KAINDL; LISA JEAN KAINDL; JANE P. MOSBACHER, named as The Heirs of Jane P. Mosbacher, Deceased; PM ASSOCIATES, a Colorado general partnership; FIRST INTERSTATE BANK OF DENVER, as Co-trustee of the Estate of W.E. Rennie est W.E. Rennie; RODERICK L. TURNER; WELLS FARGO BANK, as trustee of the George C. Vance Trust; ALBERT E. ZARLENGO, JR., as trustee for the Albert E. Zarlengo Trust; BELL SOUTH CORPO-

RATION HEALTH CARE TRUST; J. MAGNESS, INC.; SG INTERESTS I, LTD; MOSBACHER U.S.A., INC.; LAND OWNERS COALSEAM COMMITTEE,

Defendants-Appellees,

and

MERIDIAN OIL, INC; PABLO OPERATING COMPANY; TIFFANY GAS COMPANY, UNION TEXAS PETROLEUM CORPORATION, John Doe oil company and all other unknown persons or entities claiming leasehold working interests or operating rights to explore for, produce or develop coalbed methane or coal constituents from coal or coal strata reserved by the United States in patents issued under The Act of June 22, 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservations, and which entities have not obtained tribal consent to and federal approval of said exploration, production of development activities,

Defendants.

INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES; LA PLATA COUNTY, BOARD OF COUNTY COMMISSIONES; LA PLATA COUNTY CATTLEMEN'S ASSOCIATON; NATIONAL ASSOCIATION OF ROYALTY OWNERS; CAMPBELL COUNTY WYOMING MINERAL OWNERS, IGNACIO SCHOOL DISTRICT 11 JT; BAYFIELD SCHOOL DISTRICT 10 JT-R,

Amici Curiae.

Appeal from the United States District Court
for the District Court of Colorado
D.C. No. 91-B-2273

OPINION ON REHEARING EN BANC

Before SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, KELLY, HENRY, and BRISCOE, Circuit Judges, and McKAY, Senior Circuit Judge.*

SEYMOUR, Chief Judge.

This case arose from the relatively recent development of technology that has made coal bed methane (CBM) commercially valuable. The Southern Ute Indian Tribe (the Tribe) appealed the district court's grant of summary judgment to defendants Amoco Production Company and others on the Tribe's claim to ownership of coal bed methane contained in coal acquired by the Tribe as successor in interest to a statutory reservation of coal to the United States. The Tribe also appealed the district court's grant of summary judgment to the Secretary of the Interior, the Department of the Interior, and the Department of the Interior's subordinate agencies (the federal defendants) on the Tribe's claim of breach of fiduciary duty. A panel of this court reversed the district court on the issue of CBM ownership and remanded for further proceedings consistent with its decision. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816 (10 Cir. 1997). Amoco requested rehearing en banc which we granted in part as set out below.

I.

In 1991, the Tribe brought suit against Amoco Production Company, other oil companies, and individual oil and gas lessees and lessors (the Amoco defendants) who asserted ownership interests in CBM contained in coal owned by the Tribe. In its First Amended Complaint, the Tribe claimed ownership of CBM and asserted that various Amoco defendants, by exploring for and

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* Judge Wade Brorby, Judge David M. Ebel, Judge Carlos F. Lucero, and Judge Michael R. Murphy are recused in this case.

extracting CBM under oil and gas leases, had among other things: 1) trespassed on Tribal lands; 2) trespassed on Tribal coal; 3) converted Tribal coal; 4) failed to pay severance tax to the Tribe; and 5) in collusion with State of Colorado officials, deprived the Tribe of federally guaranteed rights in violation of 42 U.S.C. § 1983. The Tribe sought a variety of remedies including: 1) a declaratory judgment vesting in the Tribe ownership of CBM and other substances contained in Tribal coal; 2) declaratory judgment that Tribal consent is required for CBM extraction; 3) an order quieting title to CBM in the Tribe; 4) injunctive relief to prevent continued exploration and production of CBM without Tribal consent; 5) damages for present and future injuries to coal, for extraction of CBM, for conversion of coal, for civil rights violations, and for failure to pay severance taxes; 6) title to all exploration and production facilities on Tribal lands which, if removed, would interrupt production of CBM; and 7) costs and attorney's fees.

The Tribe also sued the federal defendants in their capacities as trustees for the Tribe. The Tribe claimed that the federal defendants breached their fiduciary duties to the Tribe by allowing exploration and extraction of CBM under oil and gas leases. The Tribe sought a declaratory judgment on the breach of fiduciary duty issue, and sought injunctive relief to prevent the federal defendants from issuing permits to explore for and extract CBM under oil and gas leases or from otherwise acquiescing in the derogation of the Tribe's alleged ownership interest in CBM.

Two issues were identified as fundamental to the resolution of all claims against the Amoco defendants: 1) the determination of CBM ownership, and 2) the existence of and applicability of defenses based on acts or omissions of the Tribe. Since resolution of either issue in favor of the Amoco defendants would settle all claims, the district court granted a joint motion by the Tribe

and Amoco to bifurcate these issues. The parties then moved to certify "a defendant class comprised of all persons, except the Tribe and governmental entities, who claim an ownership interest in the coalbed methane" for the purposes of resolving the bifurcated issues. Aplt.'s App., vol. I at 214. Amoco was designated as representative of the class and, in that capacity, brought a motion for summary judgment on the bifurcated issues. *Id.*, vol. II at 353.

The federal defendants supported the Amoco defendants' claim of ownership of CBM and asserted accordingly that they had no fiduciary duty to manage an asset for the Tribe which it did not own. The federal defendants filed a motion for summary judgment based on the Tribe's nonownership of the CBM. In the alternative, they moved to dismiss the Tribe's action as time-barred. *Id.* at 365. The Tribe brought a cross-motion for summary judgment on the issue of CBM ownership.

The district court held that CBM ownership was vested unambiguously in the Amoco defendants. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1160 (D. Colo. 1995). Consequently, the court concluded it "need not address further the application of the common defenses to the ownership question," *id.* at 1160, or reach the federal defendants' claims that the Tribe's action was barred by the statute of limitations, *id.* at 1161. It then granted summary judgment to the Amoco defendants on the issue of CBM ownership, and to the federal defendants on the "issue of breach of fiduciary duty for failure to manage the CBM gas," leaving for later determination other issues concerning fiduciary duty. *Id.* The court denied the Tribe's motion for summary judgment. *Id.*[1]

On appeal, the panel concluded in Part II A that the Coal Land Acts of 1909 and 1910, which reserved coal

[1] The district court certified its judgment for immediate appeal under Fed. R. Civ. P. 54(b).

to the United States, do not by their plain language reveal congressional intent with respect to CBM. *See Southern Ute*, 119 F.3d at 821-22. The panel held in Part II B that the Acts, viewed in historical perspective, are ambiguous regarding Congress' specific intent to include or exclude CBM in the reservation of coal. *Id.* at 822-24. Finally, in Part II C the panel addressed general congressional intent and was persuaded that Congress neither unambiguously included or excluded coal bed methane when it reserved the coal to the United States. In light of the Acts' historical context and the absence of a clear conveyance of CBM to the surface patentees, coupled with the principle of statutory construction that resolves ambiguity in favor of the sovereign, the panel concluded that CBM was reserved to the United States along with the coal. *Id.* at 826. In Part II D the panel addressed and rejected defendants' contention that deference was due to a contrary opinion issued by the Solicitor of the Department of the Interior in 1981 entitled *Ownership of and Right to Extract Coalbed Methane Gas in Federal Coal Deposits*, 88 Interior Dec. 538 (1981). The panel held that deference was not appropriate under either *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Southern Ute*, 119 F.3d at 829-36. Finally, in Part III, the panel pointed out that, in light of its reversal, further proceedings would be required on the resolution of important issues concerning the class action defenses to the Tribe's ownership of CBM which the district court held were mooted by its decision in favor of the Amoco defendants. *Id.* at 836.

Amoco petitioned for rehearing en banc. We granted rehearing limited to the issue of whether "coal" as used in the Coal Land Acts of 1909 and 1910 unambiguously excludes or includes CBM.[2] We now hold, in accordance

[2] The federal defendants did not petition for rehearing en banc. Nevertheless, they filed a supplemental brief on rehearing which clarified their position as follows:

with the panel opinion, that those statutes are ambiguous. Under the long-standing principle that property grants are construed favorably to the sovereign, we conclude the reservation of coal to the United States in the 1909 and 1910 Acts must be construed to include the ownership of CBM. In so holding, we adopt Parts II A, B, and C of the panel opinion in substantial part as modified below. The question of deference to the 1981 Solicitor's opinion

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In the proceedings before the panel in this case, the federal appellees' brief primarily addressed specific federal defenses relating to the Tribe's breach of trust claim. See Brief for the Federal Appellees 28-45. On the question of whether the Coal Land Acts of 1909 and 1910 reserved CBM, the federal appellees adopted the answer brief filed by Amoco Production Company. See *id.* at 28, 30. The brief of Amoco Production Company specifically contended, among other arguments, that the term "coal" is not ambiguous and means "the solid rock." Brief for Amoco Production Co., at 12-26. We submit this response to clarify the federal appellees' position in two respects.

First, although the federal appellees endorsed the arguments set out in the Amoco Production Company's brief, that endorsement does not signify a view that the question of CBM ownership should necessarily be resolved merely by reference to the meaning of the term "coal." Rather, the federal appellees' view on the ultimate issue of CBM ownership rested on the analysis set forth in the May 12, 1981, opinion of the Solicitor of the Interior, which concluded, for the reasons stated therein, that the Coal Land Acts of 1909 and 1910 did not reserve CBM. See *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 I.D. 538 (1981). The panel decision of this Court considered and rejected the Solicitor's analysis. See 119 F.3d at 834-836.

Second, the panel decision of the court has prompted the Solicitor of the Interior to commence a review of the analysis set out in the May 12, 1981, Solicitor's opinion. See, *e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984) (noting that an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis"). That review is ongoing and could conceivably result in a modification of the views expressed therein. Response for Federal Aplees at 3-4.

was not reconsidered by the en banc court and we therefore do not disturb the panel's disposition of that issue in Part II D of its opinion.

II.

The single issue which is determinative of this appeal is whether the Tribe, as successor in interest to a statutory reservation of coal to the United States made in the coal lands acts of 1909 and 1910, is also the owner of CBM, a gaseous substance contained in coal. "We review a grant of summary judgment de novo, applying the same legal standard used by the district court under Fed.R. Civ.P. 56(c)." *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995). Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is due judgment as a matter of law. *Id.* We construe the facts and record in the light most favorable to the party opposing the motion. *Id.* "We also review de novo the district court's interpretation of a federal statute." *Id.*; *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990).

Determination of CBM ownership where the Tribe has acquired its coal via a statutory reservation to the United States presents a question of statutory interpretation. The purpose of statutory construction is to determine congressional intent. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress . . . ."). We must decide whether Congress intended to reserve CBM to the United States (and thus to the Tribe as its successor in interest) as part of the coal reservations in the 1909 and 1910 Acts, or whether Congress intended that CBM be treated as part of the unreserved estate (belonging to the Amoco defendants' predecessors in interest).

Of critical importance is the long recognized principle of statutory construction, applicable here, that "ambiguity

or uncertainty in the terms employed [in land grants] should be resolved in favor of the government." *Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 680 (1914). It is an " 'established rule that land grants are construed favorably to the Government, that *nothing passes except what is conveyed in clear language*, and that if there are doubts they are resolved for the Government, not against it.' " *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (quoting *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957)) (emphasis added) (concluding that gravel is included in mineral reservation to the United States). The burden remains on defendants to dispel any ambiguity in the construction of the coal reservation.

A. Plain Meaning of the Statutes

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). "In interpreting statutes, we begin with the relevant language." *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990). Where the will of Congress "has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' " *Griffin*, 458 U.S. at 570 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

The relevant part of the 1909 Act states that "any person who has in good faith located, selected, or entered under the *nonmineral* land laws of the United States any lands which subsequently are *classified . . . as being valuable for coal, may* . . . upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, *which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the*

same." Law of Mar. 3, 1909, ch. 270, 35 Stat. 844 (current version at 30 U.S.C. § 81) (emphasis added) (hereinafter the 1909 Act).[3] The 1910 Act similarly states that prospective homesteaders on coal lands may obtain a patent which "shall contain a reservation to the United States of all the coal in the lands so patented, together

[3] In full, the Act as originally titled and promulgated was as follows:

> Chap. 270.—An Act For the protection of the surface rights of entrymen.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided,* That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further,* That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.
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> Law of Mar. 3, 1909, ch. 270, 35 Stat. 844 (current version at 30 U.S.C. § 81).

with the right to prospect for, mine, and remove the same." Law of June 22, 1910, ch. 318, § 3, 36 Stat. 584 (current version at 30 U.S.C. § 85) (hereinafter the 1910 Act).[4]

[4] The 1910 Act, as originally titled and enacted, provided in relevant part:

> CHAP. 318.—An Act To provide for agricultural entries on coal lands.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only . . . with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. . . .[A]ll homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" *Provided,* That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entities were made, but shall receive the limited patent provided for in this Act.
>
> . . . .
>
> SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops

The Acts neither define coal nor mention CBM; thus, the statutes do not by their plain language indicate congressional intent regarding CBM. Even in the absence of a plain articulation, however, we have other means available to evaluate congressional intent. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-48 (1987). Following this circuit's traditional approach as developed in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), and followed in *Aulston*, 915 F.2d at 589-599, we use traditional tools of statutory construction to investigate whether inclusion of CBM in the coal reservation was either specifically intended by Congress, or is consistent with Congress' general legislative purpose in enacting the 1909 and 1910 Acts.

B. Specific Congressional Intent

Congress' specific intent to include or exclude CBM in its reservation of coal *must be judged from the perspective of Congress at the time of enactment of the 1909*

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and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits; *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Law of June 22, 1910, ch. 318, §§ 1, 3, 36 Stat. 583-84 (current version at 30 U.S.C. §§ 83, 85).

and 1910 Acts. The Amoco defendants and the dissent contend we can easily discern Congress' specific intent from that perspective. First, citing many contemporaneous dictionary definitions of coal, they argue that in 1909 coal was typically defined as a solid rock, without specific mention of gaseous constituents. Second, they contend that in 1909 Congress was aware of CBM as a hazardous gaseous byproduct of coal and could specifically have retained the CBM by inserting the word "gas" in the mineral reservation had it so wished. From these facts defendants and the dissent conclude that Congress' use of the word "coal" in its mineral reservation was not inadvertent, and that Congress specifically chose to reserve only solid rock coal. We disagree with Amoco and the dissent for a number of reasons.

First, Amoco and the dissent focus solely on the word "coal" and totally ignore what is apparent from the face of the statutes: the coal was reserved from patents issued to land claimants under land grants of "non-mineral" lands to homesteaders; the lands had been "classified, claimed, or reported as being valuable for coal;" and the reservation of coal included "the right to prospect for, mine, and remove the same." *See* 1909 Act. *See also* 1910 Act. Statutes must be read in their entirety, with each term considered in light of its context and the purposes of the act. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-78 (1995).

As explained more fully below, "Congress' underlying purpose in severing the surface estate from the [coal] estate was to facilitate the concurrent development of both surface and subsurface resources." *Western Nuclear, Inc.*, 462 U.S. at 47 (construing Stock-Raising Homestead Act of 1916, which reserved to the government "all the coal and other minerals"). The public lands governed by the 1909 and 1910 Acts were lands identified by the government as primarily valuable for coal, not as primarily valuable for other minerals or for homesteading. *See generally id.* at 47-52. The text of each Act makes

clear that the coal was being reserved for subsequent mining and removal. Congress also plainly expected that these lands would be used by settlers for homesteading, with no apparent concern regarding future mining for other minerals. The title of the 1910 Act is particularly instructive in this regard: "An Act To provide for agricultural entries on coal lands." *See* n. 4 supra. *See also Western Nuclear, Inc.*, 462 U.S. at 53.

Second, while contemporaneous dictionary definitions of words in a statute are relevant, *see Smith v. United States*, 508 U.S. 223, 228-29 (1993), the existence of alternative dictionary definitions may themselves indicate that the statute is ambiguous, *see National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). Although as the dissent points out, "coal" was sometimes defined as a solid, combustible material, *see dissent* at 3, it was also defined much more broadly in many contemporaneous dictionaries and encyclopediae. For example, the NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 508 (1913 ed.) defined "coal" as:

> An amorphous substance derived from the vegetation of prehistoric ages, containing different hydrocarbons with sometimes free carbon and also complex substances carrying oxygen and nitrogen, found in beds or veins in the earth and used as fuel.

Methane was considered a hydrocarbon in 1909 and squarely falls within the description of coal components set forth in the foregoing definition of coal. *See* VI THE CENTURY DICTIONARY 3740 (1914) (methane a hydrocarbon with chemical formula of CH_4).

It was widely recognized in 1909 that coal contains gaseous constitutents:

> Hydrocarbons, such as petroleum, bitumen, paraffin, &c., are also found occasionally in coal . . . . Gases, consisting principally of light carburetted hydrogen or marsh gas [CBM], are often present in considerable quantity in coal, in a dissolved or occluded state . . . .

VI ENCYCLOPAEDIA BRITANNICA 575 (11th ed. 1910).[5] Because of its "amorphous" nature and "variable composition," coal "cannot be as strictly defined as a crystallized or definite mineral can." *Id.*; *accord* III AMERICANIZED ENCYCLOPAEDIA BRITANNICA 1643 (1890) (same definition of coal). These definitions of coal were consistent with earlier ones, which characterized "coal" as "embrac[ing] all classes of mineral fuel that will ignite and burn with flame or incandescent heat . . . . [of which] [t]he prominent varieties are denominated anthracite and bituminous coal." IV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 726 (Ripley and Dana eds., 1873). In bituminous coal "hydrogen is the predominating element, in its [coal's] gaseous or volatile constituents, though both oxygen and hydrogen are generally present in such coals in nearly equal parts." *Id.* (corresponding to methane's molecular identification as CH_4). Additionally,

> The combinations of carbon, hydrogen, oxygen, and nitrogen with earthy impurities, to which the term mineral fuel [coal] may be properly applied, are infinite, ranging through all the grades of coal, from the hard, dense anthracite to the asphaltic varieties, and from the solidified petroleum to the gaseous naphtha.

Id. The common understanding that coal was a heterogenous, complex substance counsels against acceptance of the limitations defendants and the dissent promote by their characterization of coal as simply "the solid rock."

Moreover, we are persuaded there was enough undisputed information about the unique nature of CBM

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[5] "Occluded" was defined contemporaneously as "To take in and retain; to absorb." WEBSTER'S REVISED UNABRIDGED DICTIONARY 994 (G & C Merriam Co., 1913 ed.).

itself to indicate that even if Congress intended to retain only solid rock coal, Congress in 1909 may have considered CBM to be part of that solid coal.[6] The broad contemporaneous definitions of coal quoted above showing that the reserved coal actually contained CBM in an occluded state support this conclusion. CBM is generated as part of the chemical and physical processes which convert carbon-rich sediments into solid coal (coalification). J. Hovey Kemp & Kurt M. Petersen, *Coal-Bed Gas Development in the San Juan Basin: A Primer for the Lawyer and Landman*, 1988 ROCKY MTN. ASS'N OF GEOLOGISTS 257, 259. It is trapped by adsorption[7] "on the internal surface of micropores," and as "free gas in cracks and fractures."[8] *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 Interior Dec. 538, 540 n.11 (1981) (quoting Deul, *Methane Drainage from Coal Beds, A Program of Applied Research*, 60 ROCKY MTN. COAL MINING INST. 13 (1964)).

Although CBM in a gaseous state can be produced from coal, prior to that production most CBM is not sufficiently like other natural gases[9] for us to conclude

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[6] Any modern-day dispute regarding the exact nature of CBM and whether it is a separate gas or is part of coal is irrelevant to our task, and we do not resolve that issue here. For a general discussion of the difficulty of deciding ownership of CBM even today, *see* Jeff L. Lewin et al., *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 WEST VA. L. REV. 563 (1992).

[7] Adsorption is "adhesion in an extremely thin layer of molecules . . . to the surfaces of solid bodies or liquids." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 16 (10th ed. 1993).

[8] At issue here is the ownership of CBM trapped in and produced from the coal reservoir. We do not address ownership of CBM that may have migrated away from the coal into adjacent non-coal strata. Determining the relative proportions of CBM produced from coal and non-coal strata is an issue which must be resolved on remand.

[9] A gas is "a fluid substance with the ability to expand indefinitely." THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 550 (1995).

that Congress in 1909 unambiguously intended the owners of other natural gases to also own CBM associated with the reserved coal. The adsorbed component of CBM is molecularly attracted to coal and cannot be released without an alteration in the physical state of the coal. In fact, release of either adsorbed or fracture-trapped CBM requires production techniques which often cause significant damage to the coal.[10] CBM ownership, therefore, cannot be disposed of by the simple tautology that gas is gas and coal is coal.[11] We are concerned not with the physical state of the substance as gas at the surface as it is now produced by modern technology, but rather with its physical state prior to extraction, as trapped in coal and economically inseverable in 1909. Even assuming that Congress specifically intended to retain only solid rock coal, CBM is so intimately associated with coal that Congress in 1909 could certainly have considered it part of the solid rock.[12] Indeed, it seems to us quite unlikely that Congress, if it had considered the matter, would have

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[10] Adsorbed CBM, which comprises most of the "gas" within coal, can be economically produced only by techniques which artificially induce changes in the coal reservoir. *See, e.g.*, Lewin, *supra* note 4, at 573, 576-583 (discussing vertical-borehole-induced pressure changes, hydrofracturing, and horizontal drilling).

[11] The dissent claims the relationship between adsorbed CBM and coal in the ground is no different than that between a piece of paper and the table it is lying on. Dissent at 12. However, the piece of paper would not have to be destroyed in order to move the table to a usable position, unlike the CBM adsorbed in the coal in 1909; nor would the table have to be destroyed in order to take the paper off and preserve it, unlike the coal in 1909 with respect to the adsorbed CBM. The same is, of course, true with respect to the sponge and water analogy used by the dissent. *Id.* at 13.

[12] In fact, by 1909, scientists understood that gas within coal was a constituent of coal which was generated by the coalification process. *See* Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust*, U.S. Geol. Surv. Bull. 383, H.R. Doc. No. 59-823, at 16 (1909) ("The ultimate source of the gases [within coal] . . . has arisen from the slow decomposition of organic matter as a by-product in the process which has converted vegetable humus into coal.").

reasoned, "We want the Government to hold on to the solid bituminous core of these coal deposits, but we make no claim to the thin layer of molecules of CBM which coats the surfaces."

In addition, we disagree that a specific intent to retain only solid rock coal was evinced by Congress' awareness that CBM was released as a hazardous byproduct of coal mining. CBM was not readily severable from coal in 1909 even though it is now "potentially severable" through application of advanced drilling and production technologies.[13] *See* Kemp & Petersen, *supra*, at 261 ("Due to technical advances and changes in the world energy supply, the recovery and utilization of coal-bed gas now appears to be more feasible."). It is not reasonable to impute to Congress a desire to retain only solid rock coal constituents and to convey gaseous coal constituents when CBM is an integral component of coal and in 1909 there appears to have been no technology by which a patent holder could extract and capture CBM from coal without

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13 Congress almost certainly knew in 1909 that gas could be extracted from coal. The coal degasification practiced in 1909 was, however, a different process than the CBM drilling at issue in this case. Coal degasification required mining and extraction of coal, which released some of the gas, then releasing the remaining gas by mechanically crushing the coal in an airtight receptacle, Chamberlin, *supra* note 9, at 17, or heating it, *id.* at 39; LARRY L. ANDERSON & DAVID A. TILLMAN, SYNTHETIC FUELS FROM COAL § 3.1.1, at 31 (1979). *Because these processes of degasification necessarily resulted in damage to or destruction of the coal, they could only be employed by the owner of the coal.* Accordingly, the value of the gas extracted necessarily belonged to the coal owner. CBM drilling, on the other hand, for the first time allows CBM to be released from coal and captured without bringing large volumes of coal to the surface. The technique is typically employed where the coal is deeply buried and thinly bedded and cannot be economically mined. The advent of the drilling technologies employed today to extract CBM while leaving most of the coal relatively undisturbed, *cf.* Lewin, *supra* note 4, at 593-597 (the primary concern with CBM drilling is *in situ* damage to coal reserves), creates an apparent conflict in ownership of CBM that did not exist in 1909 and 1910.

damaging or destroying the coal. Because no effective means existed in 1909 to remove adsorbed CBM leaving the coal behind, CBM physically trapped in coal was necessarily retained with the coal reservoir.

The fact that CBM could not be commercially extracted from coal in 1909 indicates to us it is inappropriate to conclude that Congress unambiguously intended a specific result one way or the other regarding CBM by its use of the word "coal." Rather, we conclude that where the commercial value of CBM was unappreciated at the time of the enactment, the text of these acts gives us no particular indication of Congress' *specific intent* with regard to that asset. *See United States v. Union Oil Co. of California*, 549 F.2d 1271, 1273 (9th Cir. 1977) ("Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to them."); *Northern Natural Gas*, 441 F.2d at 714-15 (no specific intent to exclude helium will be inferred where lessors neither knew of presence nor appreciated value of helium gas); *cf. Aulston*, 915 F.2d at 594, 599 (rejecting argument that use of "gas" in mineral reservation evinced a specific congressional intent to exclude carbon dioxide from a gas reservation, when inclusion comported with general intent of statute and value of carbon dioxide was not appreciated at time of mineral reservation).

The Amoco defendants and the dissent make much of the fact that split mineral estates were recognized and protected on private lands when Congress created the first split mineral estates on public lands by the 1909 Act. They rely on *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa.1893), which held that the oil and gas owner is entitled to drill through coal owned by another to reach the underlying gas. Defendants and the dissent refuse to acknowledge, however, that ninety years later the Supreme Court of Pennsylvania, citing *Chartiers*, issued the

seminal decision on CBM ownership in *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983). In holding that the CBM present in coal belongs to the owner of the coal estate rather than to the surface owners who reserved the gas, the court in *Hoge* observed in relevant part as follows:

> Coalbed gas is always present in coal seams; its molecules are absorbed in micropores of coal, and even the smallest particle of coal always contains, and when exposed emits, some coalbed gas. Coal and coalbed gas are, nevertheless, separate physical entities.
>
> The gas which has commonly been referred to as "natural gas" is generally found in strata deeper than coal veins, though it shares many of the characteristics of coalbed gas. Both gases evolved, through natural processes, from carbonaceous material beneath the earth's surface, and both contain mixtures of various hydrocarbons, including methane, ethane, propane, butane, carbon dioxide, carbon monoxide, and hydrogen sulfide. Both are, as are all gases, migratory, thus being capable of escaping their natural habitats to enter other strata, and both are found in the same geographic areas of Pennsylvania. Due to its fugacious character, natural gas is capable, under certain circumstances, of commingling with coalbed gas in the upper strata.

Id. at 1382.

> Gas is a mineral, though not commonly spoken of as such, and while in place it is part of the property in which it is contained, as is the case with other minerals within the bounds of a freehold estate. Gas necessarily belongs to the owner in fee, so long as it remains part of the property; ownership in it will be lost only upon grant or upon the gas leaving the property through migration. . . .

> Thus, as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting. When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee. *In accordance with the foregoing principles governing gas ownership therefore, such gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control.* The landowner, of course, has title to the property surrounding the coal. and owns such of the coalbed gas as migrates into the surrounding property.

Id. at 1383 (citations omitted) (emphasis added).

> The owner of coal may, as may any property owner, exercise dominion over his property so as to maximize his right of enjoyment thereover, within bounds limiting impingement upon the rights of other property owners. Hence, the coal owner may mine his coal, extract the gas from it, or both. If he chooses to extract the gas, drilling as well as hydrofracturing are available means, so long as their utilization does not impinge upon the rights of owners of the surrounding property, since the damage to coal inflicted by these processes is within his dominion to inflict.

Id. at 1384 (citations omitted).[14] The majority of other states addressing the issue have also held that ownership of CBM is in the coal owner. *See NCNB Texas Nat'l Bank, N.A. v. West*, 631 So. 2d 212 (Ala. 1993) (coal owner owns CBM contained in coal, and gas owner owns

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[14] The opinion in *Hoge* is ample response to the dissent's assertion that it is illogical to distinguish in ownership between CBM adsorbed in coal and CBM that has migrated. *See* dissent at 9 (the only difference between "trapped" CBM and "escaped" CBM is "dumb luck").

CBM which has migrated away from the coal reservoir); *Vines v. McKenzie Methane Corp.*, 619 So. 2d 1305 (Ala. 1993) (ownership of CBM included in grant of "all coal"); *Rayburn v. USX Corp.*, No. 85-G-2661-W, 1987 U.S. Dist. LEXIS 6920 (N.D. Ala. Jul. 28, 1987) (coal owner, USX, is owner of right to explore for and to extract occluded CBM where grantor of deed retained only oil and gas rights). *But cf. Carbon County v. Union Reserve Coal Co.*, 898 P.2d 680 (Mont. 1995) (right to extract CBM is with holder of gas exploration rights).

In summary, given that CBM was not commercially severable in 1909 and thus had no value, and given the uncertainty that Congress would have viewed adsorbed CBM as a component distinct from solid rock coal, we cannot conclude that Congress formed a specific intent to convey CBM as a gas. As a consequence, we are persuaded that the 1909 and 1910 Acts are ambiguous with respect to Congress' specific intent regarding CBM. *Cf. Western Nuclear, Inc.*, 462 U.S. at 56 (noting that the term "mineral" is ambiguous with respect to congressional intent to reserve gravel as a mineral). In the absence of specific congressional intent, we look at the general purpose of the statute and the historical context in which it was enacted to determine whether we can discern general congressional intent. *Aulston*, 915 F.2d at 598. "General intent should be discovered . . . by considering the purposes of the grant in terms of enjoyment of the rights created." *Northern Natural Gas*, 441 F.2d at 714. "In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable." *Id.* at 715.

C. General Congressional Intent

"In interpreting the relevant [statutory] language . . . we look to the provisions of the whole law, and to its object and policy." *Aulston*, 915 F.2d at 589; *see also United States v. Colorado*, 990 F.2d 1565, 1575 (10th

Cir. 1993). "[W]e look at not only the statute itself but also at the larger statutory context. We may ascertain the intent of Congress through statutory language and legislative history." *Utah v. Babbitt*, 53 F.3d at 1148 (citations omitted).

1. History

To understand the general congressional intent behind the 1909 and 1910 Acts, we review the historical context in which they were enacted, including the history of the Southern Ute Tribe's acquisition of its reservation lands and the United States' reservation of the coal it ultimately conveyed to the Tribe. We begin in the latter half of the nineteenth century with the formation of the Southern Ute Indian Reservation.

The Ute Indian Reservation was established in 1864, when the Uncompahgre, White River and Southern Utes "exchanged their aboriginal lands in New Mexico, Utah, and Colorado for . . . approximately 15.7 million acres . . . within Colorado." *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971). The reservation did not long remain intact. In 1874, 3.7 million acres of the reservation were ceded to the United States upon discovery of mineral resources on reservation land. *Id.* In 1880, the remaining reservation land was ceded to the United States in return for individual allotments and "shares in the proceeds of unallotted land sales." *Id.* at 164 (quoting *United States v. Southern Ute Tribe or Band of Indians*, 423 F.2d 346, 350 (Ct. Cl. 1970)). The Uncompahgre and White River Utes left the reservation before 1882. *Id.* at 162.

After the cession of reservation land, the United States opened the ceded, non-allotted reservation to homesteading and mineral exploration under the terms and conditions of a variety of federal statutes. *Amoco Prod. Co.*, 874 F. Supp. at 1148 (citing the Homestead Act of 1862, 43 U.S.C. §§ 161 *et seq.* (repealed 1976), the Coal

Lands Act of 1873, 17 Stat. 607, and the Mining Law of 1872, 30 U.S.C.A. § 22). At that time, "the disposition of land owned by the United States depended upon whether it was classified as mineral land or nonmineral land, and title to the entire land was disposed of on the basis of th[at] classification." *Western Nuclear, Inc.*, 462 U.S. at 47. Because the United States Geological Survey had insufficient resources to evaluate the mineral character of each land parcel before patent issuance, it often depended on the attestation of a patent applicant to determine the character of his land. *Id.* at 48 n.9. Although this honor system for patent evaluation inevitably led to considerable abuse, agricultural settlement and mineral exploration of reservation lands and other areas in the western United States proceeded for several decades under this system.

In 1906, President Roosevelt withdrew from homesteading or mineral patenting approximately 64 million acres considered to be valuable for coal resources, including the ceded, non-allotted Ute Reservation lands. *Id.* at 48-49 (citing 41 CONG. REC. 2615 (1907)). Two concerns drove the withdrawal of coal lands: first, the government wished to end the issuance of patents in reliance on an entrant's attestation of the mineral character of the land; and second, the government wished to encourage optimal land use by ensuring that lands valuable for mineral resources would not be held unavailable for mineral exploration by homesteading claims. *Id.* In his Sixth Annual Message to the nation, President Roosevelt explained that the withdrawal was necessary to preserve ownership of coal resources in the United States and to ensure price control of coal and disposition of the coal resources "under conditions which would inure to the benefit of the public as a whole." PRESIDENT THEODORE ROOSEVELT, SIXTH ANNUAL MESSAGE (Dec. 3, 1906), *reprinted in* XV THE WORKS OF THEODORE ROOSEVELT 363 (1926).

The 1906 withdrawal included lands on which the process of homesteading (holding the land for a term of years in agricultural use in return for a land patent) had begun. Homesteaders who had entered the land in good faith, believing the land to be of nonmineral character, were disenfranchised by the withdrawal. To remedy that disenfranchisement while preserving the value of coal for future use of the United States, Congress enacted the 1909 Act. That act permitted existing good faith agricultural entrants whose land had been subject to the 1906 withdrawal to receive patents for those lands subject only to a "reservation to the United States of all coal in said lands." 30 U.S.C. § 81. In 1910, Congress enacted a similar statute for the protection of prospective agricultural entrants to federal lands. Under the protection of these Acts, the Amoco defendants' predecessors in interest claimed patents to land subject only to the reservation of coal in the United States.

Homesteading and mineral exploration proceeded under these statutes until 1934, when Congress changed its policy toward Indian Tribes and passed the Indian Reorganization Act (IRA), 25 U.S.C. §§ 463-479, which restored to tribal ownership some lands previously taken by the federal government. Congress provided that "[t]he Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934," subject to any outstanding rights or claims. *Id.* § 463(a). In 1938, pursuant to the 1934 Act, equitable title to coal held by the federal government on the Southern Ute Reservation was returned to the Tribe, subject to outstanding homestead patents. *Amoco Prod. Co.*, 874 F. Supp. at 1151.

2. Analysis

With this background, we turn to the general intent behind the 1909 and 1910 Acts. Defendants argue and

the district court agreed, *id.* at 1155-59, that, in attempting to preserve coal lands for the benefit of the public as a whole and to remedy the negative impacts of the 1906 land withdrawals, Congress specifically considered and rejected a broad reservation of all minerals. From that rejection, defendants contend, we should infer that Congress knowingly chose the most narrow possible meaning of coal. Defendants rely on a passage of debate between a member of the House of Representatives from Texas and the Chairman of the Committee on Public Lands concerning the intended mineral reservation:

> Mr. STEPHENS of Texas. Could the gentleman better arrive at what he desires by only patenting the surface of the land and *reserving all minerals, precious and otherwise*?
>
> Mr. MONDELL. That has been discussed at some length, and *the Committee on Public Lands is not of the opinion that that ought to be done.* We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some *coals* of value.

43 CONG. REC. 2504 (1909) (emphasis added). Even bearing in mind the admonition that legislative history should be treated cautiously, *Exxon Corp. v. Lujan,* 970 F.2d 757, 761 (10th Cir. 1992), it is clear that Congress recognized in 1909 it had the option to reserve "all minerals" and rejected that option.

Congress' rejection of an "all minerals" reservation, however, does not inform us about Congress' intent regarding the extent of the reservation of a single substance, "coal." Moreover, the quoted exchange between Representatives Stephens and Mondell does not bear the weight defendants would have us give it because the Committee affirmatively considered and rejected several other options,

including no reservation of coal. Aplt.'s App., vol VI at 1275, *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands,* 59th Cong., 2d. Sess. 17 (Dec. 17, 1906) (hereinafter *Hearings*) (statement of Edgar E. Clark) (considering the use of government-imposed railroad rates to retain control of coal supply). *The Committee also discussed and rejected the possibility of retaining only ownership of coal which was marketable in 1907.* Aplt.'s App., vol. VI at 1286, *Hearings,* at 15 (Jan. 9, 1907) (statement of Marius R. Campbell); *id.* at 1281 (noting that the western coals at issue in this case were not mineable at that time and were "inferior to the eastern coals, particularly from a steaming and coking standpoint").

Rather than adopt any of those options, Congress chose to reserve "all the coal." *Id.* at 1287 (The "only really effective way to retain the balance of the coal in the public domain in public ownership . . . [was to] reserve the coal under the surface of all of the land. That would effectively retain in public ownership all the coal."). In so doing, the Committee was specifically informed it would retain coal that was not presently valuable, but which could become valuable in the future. *Id.* at 1281 ("[W]hat may not be coking [valuable] coal to-day may be coking coal to-morrow; because there are improvements going on."); *id.* at 1282 ("these [coals] may have a much greater value in the future").[15]

It is apparent from the legislative history of the 1909 and 1910 Acts that Congress understood it had the option

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[15] The dissent finds it anomalous that we rely on Congressional recognition of advancing technology in coal mining to support our conclusion. We, in turn, find anomalous the dissent's position that when Congress reserved in 1909 and 1910 "all coal and the right to . . . mine, and remove the same" it unambiguously intended to give away to a homesteader on lands valuable for coal a hazardous product required at the time to be vented off and wasted in order to safely mine the coal.

to reserve to the United States only coal having current economic value, and rejected that narrow mineral reservation. Congress knew there was indeterminate potential value in the reserved coal and intended to secure that value for the United States.[16] Rather than indicating a limited reservation of coal to the United States, the legislative history suggests that Congress adopted an interpretation of coal which encompassed both the present and future economic value of coal for energy purposes, including value that could only be realized through advances in technology such as those which drive the present day exploration for CBM.

We cannot discern from the statute as a whole or the historical context in which it was drafted any unambiguous intention either to convey CBM to the surface patentees,[17] or to retain it. Congress' broad general intent and the absence of a clear conveyance of CBM to the surface patentees, coupled with the principle of statutory construction that resolves ambiguity in favor of the sovereign, however, persuades us that CBM was reserved to the United States.

3. Related Statutes

Our conclusion that the reservation of coal should include CBM is buttressed by the interpretation given to analogous statutory mineral reservations. The same principle we rely on here, that ambiguity or uncertainty in the terms employed in land grants should be resolved in favor of the government, has been a subtext in the inter-

[16] Moreover, we cannot believe that Congress would have countenanced ceding CBM to surface patentees, *see infra* note 12, knowing that degasification at the time would have involved damage to and possibly destruction of the very resource sought to be reserved. *See supra* note 10.

[17] "Surface patent" is used throughout this opinion to indicate the surface estate patented to agricultural entrants under the 1909 and 1910 Acts, which estate included all minerals other than coal.

pretation of many similar statutes reserving minerals to the United States.

In 1914, Congress enacted the Agricultural Entry Act, 30 U.S.C. §§ 121-125 (hereinafter the 1914 Act), reserving "phosphate, nitrate, potash, oil, gas, or asphaltic minerals" to the United States, *id.* § 121. Then in 1916, Congress enacted the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (hereinafter the 1916 Act), which reserved to the United States "all the coal and other minerals," *id.* § 299. Uniformly, courts have treated these mineral reservations expansively. *Western Nuclear, Inc.*, 462 U.S. at 60 ("gravel is a mineral reserved to the United States in lands patented under" the 1916 Act); *Aulston*, 915 F.2d at 585 (reservation of "gas" in the 1914 Act includes carbon dioxide); *Union Oil Co.*, 549 F.2d at 1279 (geothermal energy included in 1916 Act's reservation of "all the coal and other minerals"); *Brennan v. Udall*, 379 F.2d 803, 804 (10th Cir. 1967) (oil shale included in 1914 Act reservation of oil). Although the language employed in the 1914 and 1916 reservations is more expansive and admits more variety in type and character of mineral reservation than the language used in the 1909 and 1910 Acts, judicial interpretations of these statutes have reached for the outer limits of reasonable construction in favor of the sovereign. A particularly notable example is one court's classification of geothermal energy (hot water and steam) as a "mineral." *Union Oil Co.*, 549 F.2d at 1279. In fact, we have found no occasion in which a reservation of a mineral asset to the United States has been treated narrowly to exclude a newly appreciated value associated with that mineral; the cases cited above offer no support for doing so now.[18]

[18] In 1955, to aid exploration and extraction of uranium and other source materials in coal reserved to the United States by the 1909 and 1910 Acts, Congress enacted legislation to control "Entry and Location on Coal Lands on Discovery of Source Material." 30 U.S.C. §§ 541-541i (hereinafter the 1955 Act). The Amoco defendants consider the legislative history of the 1955 Act relevant to our

4. Summary

In summary, the direct legislative history of the coal lands acts indicates that Congress intended a reservation of coal that encompassed both the present and future economic value of coal. Congress was aware that full economic realization of that benefit would require advances in technology. Present day exploitation of CBM is a benefit of coal ownership that is consistent with Congress' general statutory intent. Given the absence of value attributed to CBM in 1909 and 1910 and the danger it presented to coal miners, we cannot infer that Congress unambiguously intended to convey to the surface patent holder a component of coal which could not be severed at the time of the statutes' enactments except in the process of mining the coal itself.

III

For the foregoing reasons, we hold that "coal" as used in the Coal Land Acts of 1909 and 1910 neither unambiguously includes or excludes coal bed methane. Given the established principle that all doubts respecting land

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determination of CBM ownership. We are not persuaded Amoco's interpretation of the legislative history of the 1955 Act is the only interpretation the enactment will bear. In any event, Congress' allocation of the right to extract uranium in coal cannot be equated to the CBM at issue in this case because uranium is not invariably included in coal as part of the coalification process and because the 1955 Act does not purport to apply to nonfederal lands.

Amoco also relies on a 1933 House of Representatives' report to suggest that Congress has recognized dual ownership between the United States and agricultural patent holders when reserved minerals are found commingled with unreserved minerals. Amoco En Banc Br. at 47 (citing H.R. REP. No. 72-1938, at 2 (1933)). The House report and the subsequently enacted 1933 Act, which consolidated in the United States ownership of commingled sodium and potash, 30 U.S.C. § 124, do not particularly inform us about the 1909 and 1910 coal reservations, and certainly do not persuade us to ignore our mandate to resolve doubts and ambiguities in the 1909 and 1910 coal reservations in favor of the sovereign.

grants and mineral reservations are construed in favor of the government, *see Watt v. Western Nuclear, Inc.*, 462 U.S. at 59, we conclude that coal reserved to the United States in the 1909 and 1910 Acts includes the adsorbed CBM.

The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.[19]

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[19] Our reversal will require the district court to address the defenses asserted by defendants to preclude recovery by the Tribe, at least some of which appear to raise issues of serious magnitude.

Tacha, J., dissenting

The majority finds that when Congress used the word "coal" in 1909 and 1910, it may have been referring not only to the solid rock we all understand coal to be, but also a gas by-product of coal, some of which seeps into nearby rock and some of which remains in the air pockets or cracks in the coal. Because coal was not understood, either in 1909 or today, to include a gas, I respectfully dissent.

I.

This appeal hinges on a single question of statutory interpretation: does the federal government's reservation of coal in the Coal Lands Acts of 1909 and 1910 include coalbed methane (CBM), a gas that exists in and around coal deposits?

When interpreting statutory terms, "[o]ur task is to give effect to the will of Congress." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). Of course, the most persuasive evidence of Congress's will are the words that Congress used in the statute itself. *See United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940); *Finley v. United States*, 123 F.3d 1342, 1347 (10th Cir. 1997) (en banc). Therefore, perhaps the most basic rule of statutory construction is that when the language of a statute has a reasonably plain meaning, "that language must ordinarily be regarded as conclusive." *Griffin*, 458 U.S. at 570 (citations and internal quotation marks omitted); *Moskal v. United States*, 498 U.S. 103, 108 (1990). Only the most extraordinary showing of a contrary legislative intent can justify a departure from the plain meaning of statutory language. *See Garcia v. United States*, 469 U.S. 70, 75 (1984).

The plain-meaning rule is a basic consequence of our system of separated government powers, in which judges must yield to the political decisions of legislators. "Deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language

of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States v. Locke*, 471 U.S. 84, 95 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The Judiciary has no license "to soften the clear import of Congress' chosen word whenever a court believes those words lead to a harsh result." *Locke*, 471 U.S. at 95.

The relevant legislative intent is that of the Congress that passed the disputed provision. *See Andrus v. Charlestone Stone Products, Co.*, 436 U.S. 604, 611 (1978); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 47 (1983) (referring to the meaning of "minerals" in 1916 when interpreting Stock-Raising Homestead Act of 1916). Thus, we must determine the ordinary meaning of "coal" as it was understood in 1909 and 1910, not the present.

The majority opinion concludes that "coal" has no plain meaning because the statutes "neither define coal nor mention CBM." *See* Maj. Op. at 18. It is well-established, however, that a term need not be defined in a statute in order to have a controlling plain meaning. Instead, when a statute does not define a word, we give that word its ordinary or natural meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 898 (10th Cir. 1997). For several reasons, it is plain to me that the ordinary and common meaning of "coal" as Congress understood it in 1909 did not include coalbed methane.

A.

First, the term coal is not ordinarily understood to refer to a gas. "Common and ordinary usage may be obtained by reference to a dictionary." *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir. 1996). As the district court pointed out, the dictionaries and general reference works of the late-nineteenth and early twentieth century uniformly described coal as a solid material. *See Southern*

Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1153 (D. Colo. 1995) (citing AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 244 (1889) (defining coal as a "black, or brownish black *solid*, combustible substance consisting . . . mainly of carbon"); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 424 (1920) (defining coal as "a black, or brownish black, *solid*, combustible mineral substance"); A. FAY, A GLOSSARY OF THE MINING AND MINERAL INDUSTRY 163 (1920) (describing coal as "a *solid* substance varying in color from dark-brown to black, brittle, combustible, and used a fuel") (emphasis added)); *see also* E.A.N. ARBER, THE NATURAL HISTORY OF COAL 4 (1912) ("[C]oal is *not a mineral but a rock*. Coal is as much a rock as standstones, limestones, granites or marbles.") (emphasis in original). These descriptions of coal as a "solid" are the first indication that the collective understanding of coal in 1909 did not include CBM, a gas.

More importantly, the people of 1909 knew of the existence of CBM. CBM is a combustible gas released in the coal mining process. In the early twentieth century, coal miners ventilated mines before entering them to reduce the chance of explosions, used canaries to detect methane levels, and at times even purposefully lit collected gas to remove it from the mines. Despite these efforts, the ignition of CBM in coal mines led to the death of hundreds of coal miners each year. *See* Rollin T. Chaimberlain, *Notes on Explosive Mine Gases and Dusts*, U.S. Geol. Surv. Bull. 383, H.R. Doc. No. 1583, 60th Cong., 2d Sess., at 6 (1909). Because CBM was such an important—and dangerous—aspect of coal mining, it was very much a part of the general knowledge in 1909. It is clear not only that people of the time were aware that CBM existed, but also that they thought of CBM as a gas: one of the common names used for it was "marsh gas."

If there had been no knowledge of CBM in 1909, the contemporary definitions of coal as a "solid" would have been ambiguous as to CBM, and the majority would be correct that it is unclear whether the 1909 reservation of "coal" was meant to include only the solid coal rock, or whether it also included the CBM gas contained in and around the coal. It is extremely unlikely, however, that a people as familiar with CBM gas as the people of 1909 would define coal as a "solid" if they also thought of CBM gas as coal. It is much more likely—indeed, it is quite plain—that the 1909 descriptions of coal as a solid, despite the intimate familiarity with CBM, is a further indication that the people did not believe that coal included CBM, a gas.

It is axiomatic that gas and solids are two distinct properties, and that one is not thought to include the other. It is illuminating, however, that reference works of the times provided separate, non-overlapping definitions of coal and "marsh gas." *See, e.g.*, THE UNIVERSAL ENCYCLOPAEDIC DICTIONARY 945 (1905) (defining "coal" as "a stratified rock"); *id.* at 2637 (defining "marsh gas" as "a hydrocarbon gas very abundant in nature"). These works demonstrate a commonly understood difference between marsh gas released as a consequence of coal mining and the coal itself. The fact that Congress understood coal to be a solid, understood that marsh gas existed as a gas, and did not mention marsh gas in the statutes, persuades me that they did not mean to include CBM when they said "coal."

B.

1.

Two further points support my plain-meaning interpretation of the term "coal." The first involves the uses to which coal and CBM were put in 1909 and 1910. As the district court noted, coal—that is, the solid material—was the nation's primary energy resource in the early twentieth century. *See Southern Ute Indian Tribe*, 874 F. Supp. at 1149. Coal was the driving force behind this

country's transition from an agrarian economy to an industrial economy. *See id.* Coal, the solid, heated our nation's homes and played an indispensable role in the production of steel. The importance of the mineral to our nation cannot be overstated. Marsh gas, to the contrary, was considered a waste product. As I have said, miners knew of it because it was a danger to their lives, but the gas had no economic value at the time.

In the early 1900s, a "coal famine" struck the West. That shortage in supply led to government investigations and the discovery that many had fraudulently procured land that was rich in coal. This discovery, in turn, prompted President Roosevelt to withdraw vast amounts of land from the homesteading process and ultimately led to the passage of the Coal Lands Acts. In reserving coal to the federal government, Congress was attempting to manage and conserve the country's most important resource—the solid rock coal—not the waste by-product coalbed methane. When examined against the backdrop of the early twentieth century, the majority's interpretation that Congress may have thought "coal" also included CBM, an unused and unusable gas, seems extremely artificial.

One of the plaintiff's own experts said in a report that pre-dates this action:

> Coal has *classically* been regarded as a solid fuel. . . . [I]n terms of its conventional usage, coal is considered to be a (solid) rock which could be burned and utilized as an energy resource. Based upon this definition, utilization of the energy potential of a coal bed would necessarily entail the mining of the coal and removal to the surface, during which process most of the entrapped methane would be released. The residual "solid" is what would be conventionally regarded as "coal", to the exclusion of any escaped gases that were originally present underground.

Applt. App. at 1602, 1604 (Report of Jeffrey R. Levine, Ph.D.) (emphasis added) (parentheses in original).[1] This *classical* understanding of coal dated back at least to 1909.

Without explanation, the majority contends that the fact that CBM was useless in 1909 makes the statute ambiguous as to CBM. *See* Maj. Op. at 27 ("[W]here the commercial value of CBM was unappreciated at the time of the enactment, the text of these acts gives us no particular indication of Congress' *specific intent* with regard to that asset."). I draw quite the opposite conclusion. CBM was a waste product in 1909. Its ownership not being desirable, one would not expect the United States to reserve it. Because a reservation of CBM would go against expectations, that would make it *more*, rather than less, imperative for the government to mention the gas in its reservation of coal. Thus, the fact that CBM had no value confirms the plain meaning, rather than creating an ambiguity.

The text of the majority opinion just quoted from not only fails to convince me that CBM's lack of value creates an ambiguity, it also points back to the majority's central interpretive error. The passage suggests that because the statute does not refer to CBM, it is ambiguous with regard to CBM. Earlier in its opinion, the majority states explicitly that the 1909 and 1910 Acts do not "mention CBM; thus, the statutes do not by their plain language indicate congressional intent regarding CBM." Maj. Op. at 18. Likewise, the 1909 and 1910 Acts do not mention the Holy Grail, the Hope Diamond, or my left shoe. Yet I doubt that if any of these items were found within a coalbed reserved by the United States in

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[1] This document was originally produced in the district court and was subject to a Protective Order governing confidential documents in this case. Without objection, the appellants included this report in the public record on appeal. Therefore, we cite to it. All other documents produced in this case remain subject to the confidentiality provisions of the Protective Order.

1909 and 1910, one would conclude that they might actually be "coal." Silence does not equate with ambiguity.

2.

Secondly, coal retains all of its economic value after the natural release of the methane.[2] This too was commonly understood in 1909. That CBM has no effect on the uses of coal highlights the independence of the two minerals. Contrast CBM's presence within coal and that of water's presence within coal. Some water is always present inside coal. It forms hydrogen bonds with the coal. These bonds are much stronger than those that bind CBM to the surface of the coal. The presence of water in coal affects the economic value of coal; the drier coal is, the better it burns—the less water in coal the better. That water affects coal's ability to create energy—its distinguishing characteristic in our society—creates a question as to whether it is actually part of the coal or not. No such ambiguities, however, exist for CBM. Regardless of how much CBM is trapped in or on coal, the coal's value is unchanged. I reemphasize that this was commonly understood in 1909.

C.

I cannot fail to mention that the court's reading of the word "coal" as ambiguous controverts its plain meaning in at least one additional respect. Much of the CBM in a coal deposit—over 90 percent according to the record—strays from the coalbed over time. It escapes into nearby rock such as sandstone or shale. This too was

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[2] The following exchange occurred in the deposition of the plaintiff's expert:

> "Q. Is there any use that you can think of to which coal—which is made of coal which cannot be made after methane is removed from it?
>
> A. I can't think of any at this time."

Applt. App. at 1685.

commonly understood in 1909. The majority states that its opinion applies only to the CBM that remains within the coalbed. *See* Maj. Op. at 24 n.8. The majority's reluctance to address CBM that has escaped from the coalbed is understandable, because doing so reveals the conflict between the classical understanding of "coal" and the result reached in this case. If the majority were to declare that the 1909 Congress did not think of escaped CBM as coal—an entirely correct declaration—it would find itself in the uncomfortable position of saying that Congress might have thought that some CBM is coal (i.e., the CBM trapped in coal deposits), but that some CBM definitely is not coal (i.e., the escaped CBM), even though there is no chemical difference between the two groups of CBM. The only difference between the two is dumb luck. In the formation of the coalbed and surrounding rock, some methane was captured by the coal and some was not.

If the majority were being true to its own reasoning, it would find that Congress's use of "coal" in 1909 is also ambiguous with respect to the CBM that escapes into nearby rock. That conclusion, however, exposes bare the chasm between the traditional understanding of "coal" and today's result. No one attuned to the common understanding of coal, either today or in 1909, would say that sandstone that has been penetrated by methane that originated in a coalbed contains "coal."

II.

A.

The majority rejects the plain meaning analysis for two reasons, neither of which is persuasive. First, the court asserts that the 1909 Congress may have thought CBM was part of the solid rock. *See* Maj. Op. at 23 ("[T]here was enough undisputed information about the unique nature of CBM to indicate that even if Congress intended to retain only solid rock coal, Congress in 1909

may have considered CBM to be part of that solid coal."); *id.* at 24 ("Although CBM in a gaseous state can be produced from coal, prior to that production most CBM is not sufficiently like other natural gases for us to conclude that Congress in 1909 unambiguously intended the owners of other natural gases to also own CBM associated with the reserved coal."); *id.* at 25 ("CBM is so intimately associated with coal that Congress in 1909 could have considered it part of the solid rock."). The majority does not identify the "undisputed information" or the "unique" properties of CBM upon which it relies for its conclusion. Apparently, the distinction between CBM and other natural gases that the majority finds important is the fact that other gases expand indefinitely, while CBM (that is, the portion of the CBM that remains with the coal deposit) is either trapped inside air pockets in the coal or attached to smaller fractures or pores on the surface of the coal. I fail to discern the legal difference that these features of CBM make.

The fact that some of the gas is trapped in the coal, and therefore does not expand indefinitely, cannot be the decisive factor. Gas becomes trapped in sandstone, shale, and other rocks, and yet we still consider it gas. In fact, this is exactly what happens to the CBM that escapes from the coalbed. It becomes trapped in adjacent rock. *See* Jeff L. Lewin, et al., *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 W. VA. L. REV. 563, 573 (1992). There is nothing unique about gas being trapped in a rock. Likewise, when gas is released from the ground, it must be trapped in containers in order to be made useful. Nonetheless, we do not say that a tank of natural gas is not gas, merely because it is not expanding indefinitely. In order to be a gas, an element must possess "*the ability to* expand indefinitely." *See* Maj. Op. at 24 n.9 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 550 (1995) (emphasis added). No one would dispute that CBM possesses that characteristic. *See, e.g.*,

Applt. App. at 1609 (Report of Jeffrey R. Levine, Ph.D.) ("In a gaseous state methane behaves very nearly as an 'ideal' gas, meaning that it exhibits very little attractive forces between molecules, and its behavior conforms fairly closely with the 'Ideal Gas Law.' ").

Similarly, the fact that some gas attaches to the smaller "micropores" on the surface of the coal cannot be a basis to believe that the 1909 Congress may have thought the gas was part of the solid rock. As the majority points out, a process known as "adsorption" or "sorption" causes some CBM to collect in pores on the surface of the coal. There are two types of sorption: physical sorption and chemical sorption. The sorption process relevant to this case is physical sorption. Physical sorption occurs between gases of all types and solids. The gas is held close to the coal's surface area by weak forces known as van der Waals forces. According to the plaintiff's expert, van der Waal's forces occur "between most any pair of substances." Applt. App. at 1687. The forces are so weak that neither the gas molecules nor those on the surface of the solid are chemically altered. The deposition of one of the plaintiff's experts reveals the pervasiveness (and weakness) of van der Waals forces:

> Q. If I put this paper on the table, is the bottom page bound to the table by van der Waals forces?
>
> A. To a certain degree, yes.
>
> Q. Is it part of the table?
>
> A. No, it is not.

Applt. App. 1694. The van der Waals forces that hold the gas to the surface have been likened to gravity—it keeps us on the ground but does not make us part of mother earth.

In contrast, when chemical sorption occurs, actual chemical bonds form between the gas and the solid. This

leads to an irreversible change in the chemical properties of both the gas and the solid. Physical sorption, unlike chemical sorption, can be reversed; the sorbed gas can be removed from the solid by the simple reduction of pressure.

Although the majority uses suggestive rhetoric in stating that CBM has a "unique nature," *id.* at 23, that it is "molecularly attracted to coal," *id.* at 24, "intimately associated with coal," *id.* at 25, and an "integral component of coal," *id.* at 26, it does not actually identify a reason to believe that the physical sorption of CBM makes it part of the coal, or that the 1909 Congress believed that it was part of the coal. The physical sorption of CBM in coal—to the ordinary understanding—is much like the retention of water in a sponge. And yet we do not believe, merely because of the "intimate association" between the water and the sponge, that they have become one and the same. Instead, we conceive of the liquid water and the solid sponge as two distinct items. There is nothing about the process of physical sorption—which occurs as a result of universal van der Waals forces and is reversible upon the mere reduction of air pressure—that leads me to conclude that the ordinary and traditional understanding of coal should be abandoned. In fact, it confirms that "coal" does not include CBM.

The crux of the majority's argument is that the understanding of CBM and coal in 1909 was inconclusive enough that Congress may have intended to reserve CBM when it reserved coal. In footnote twelve, the majority presents a different and far bolder argument—which is nonetheless wrong also. Rather than arguing that the scientific information available in 1909 created an *ambiguity* with regard to CBM, the majority in footnote twelve states that scientists in 1909 *actually understood CBM to be part of coal*. The majority offers one quotation in support of that statement: "The ultimate source

of the gases [within coal] . . . has arisen from the slow decomposition of organic matter as a by-product in the process which has converted vegetable humus into coal." Rollin T. Chaimberlain, *Notes on Explosive Mine Gases and Dusts*, U.S. Geol. Surv. Bull. 383, H.R. Doc. No. 1583, 60th Cong., 2d Sess., at 16 (1909). The majority's belief that this statement supports its position highlights the error of its ways. This source clearly identifies CBM as a *by-product* of coal. A by-product is something separate, secondary, or additional to the principal product from which it came. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 307 (1981). A "by-product" of coal is far different from an "integral component" of coal, as the majority describes CBM at another part of the opinion. Maj. Op. at 26. This quotation creates no ambiguity as to the ordinary meaning of "coal," nor does it indicate that scientists actually believed CBM was part of coal, though it does create an ambiguity in the majority's rationale. In fact, this quotation supports my position that the scientists of 1909 understood coal and CBM to be separate and distinct.

Other sources directly conflict with the majority's assertion that CBM was considered part of coal in 1909. For instance, only fifteen years after the passage of the first Coal Lands Act, scientists were saying:

> What we know about the chemistry of coal is almost negligible. It is true that chemists have considerable knowledge of the products of distillation, but probably *none of those substances are to be found in coal as such.*

REINHARDT THIESSEN, THE ORIGIN AND CONSTITUTION OF COAL 3 (1924).

B.

The other fact that the majority relies on in rejecting the plain meaning of "coal" is that in 1909-10, there was

no process by which CBM could be extracted from coal and captured without damaging or destroying the coal. Apparently, CBM could not be captured without actually removing the coal from the earth and crushing it in an airtight receptacle. Assuming this to be true, it should make no difference in our interpretation of the statute.

1.

The majority's reliance on the lack of extraction technology demonstrates that it has conflated two very different questions. The majority concludes that because CBM could not be mined without destroying the coal, the coal owner must also have owned the CBM. Even in 1909, however, the common law on split mineral estates distinguished between the questions of (1) who owns a mineral under the ground, and (2) the extent to which the owner can interfere with the property rights of another to extract his mineral.

For instance, in *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Penn. 1893), the surface owner had granted the right to the coal under his land to the plaintiff, Chartiers Block. Subsequently, the surface owner realized that valuable oil and gas lay beneath the coal. Thus, the surface owner made leases for that oil and gas, and the lessees began to drill for it, intending to drill wells through the coal stratum. Chartiers Block sought an injunction on two grounds: (1) the lessees had no right to the minerals under the coal, and (2) even if they did, they could not drill through the coal to access the oil and gas because the lessees' mining operations would destroy the value of the coal. *See id.* at 597. The structure of this challenge reveals that the plaintiff recognized the distinction between ownership of a mineral and the right to extract it. The Pennsylvania Supreme Court's decision confirms that the law recognized the distinction even in 1893.

The court first easily rejected the notion that the owner of the coal estate had any rights to the underlying oil and

gas merely because the lessees had to penetrate the coal to get to it. *See id.* at 599 ("The grantee of the coal owns the coal, *but nothing else* . . . .") (emphasis added); *id.* ("The position that the owner of the coal . . . may forever prevent the surface owner from reaching underlying stratum, has no authority in reason, nor, do I think, in law."). Whether or not the oil and gas mining would destroy the value of the coal was immaterial to the prior question of who owned the oil and gas. The court ruled that the lessees could drill through the coal to get to their gas and oil, provided that they did not inflict unreasonable damage to the coal. *See id.* (finding that the lessees have a right of access but that "the right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining.").

In reaching its conclusion, the court clearly distinguished between mineral ownership rights and the right to extract that mineral.

> [W]hen the owner of the surface parted with the underlying coal, he parted with nothing but the coal. He gave no title to any of the strata underlying it, and it is not to be supposed for a moment that the grantor parted with or intended to part with his right of access to it. . . . *The only question is how that right shall be exercised, by what authority, and under what limitations.*

Id. Accordingly, the court said that "[t]he right of the surface owner to reach his estate below the coal exists at all times. *The exercise of it may be more difficult at some times than at others.*" *Id.* (emphasis added). Thus, *Chartiers Block* stands for at least two propositions. The first is that the surface owner who has granted coal right to another retains title in *everything* but the coal. The second is that the surface owner can extract the minerals that he owns as long as he does not unreasonably damage the coal. These principles remain part of the common

law today. *See, e.g., Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995) (en banc) (stating that owner of mineral estate may make reasonably necessary use of the surface owner's land to extract minerals).

If the majority is correct in asserting that CBM could not be extracted in 1909 without destroying coal, that does not lead to the conclusion that the surface owner did not own the CBM. At most, it means that the surface owner could not immediately mine for CBM because mining would have led to unreasonable damage to the coal. *See Chartiers Block*, 152 P.2d at 297 ("The most that can be claimed is that, pending the removal [of the coal, the plaintiff's] right of access to the lower strata is suspended."). The majority is incorrect in finding that the inability to extract CBM from coal without damaging the coal determines the separate ownership question.[3]

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[3] The majority responds to our discussion of the distinction between ownership rights and extraction rights, and *Chartiers Block* in particular, by noting that ninety years after that decision, the Pennsylvania Supreme Court decided in *United States v. Hoge*, 468 A.2d 1380 (Pa. 1983) that a private deed granting coal included a grant of CBM. *Hoge* is inapposite for two reasons. First, it does not in any way call into doubt *Chartiers Block*'s distinction between ownership and extraction rights, the point for which I cited it. Second, *Hoge* interprets a deed rather than a federal reservation of a mineral. Interestingly, the original panel opinion in this case explains why a state case about a common law deed, like *Hoge*, is irrelevant to this appeal:

> The [parties] have cited state court cases which have considered ownership of CBM. As interesting as these cases are (four of five deciding ownership of CBM is in the coal owner), they are not dispositive of the case at bar. The state cases construe CBM ownership in the context of common law deeds, which are negotiated conveyances with specific rules and presumptions of construction. These cases ultimately have little to offer in terms of our interpretation of Congressional intent in the 1909 and 1910 Acts.

See Southern Ute Indian Tribe v. Amoco, 119 F.3d 816, 828 n.17 (10th Cir. 1997). Notwithstanding the majority's marked reversal on the importance of the state cases, the *Hoge* opinion itself demonstrates why it has "little to offer" in this appeal. For instance, *Hoge* relies on the common law rule that "as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting." *Hoge*, 468 A.2d at 147. Also, in discerning the intent of the *parties to the instrument*, the *Hoge* court worked on the premise that the parties intended to reserve only those minerals which were "generally known to be commercially exploitable." *Id.* at 150. Although I ultimately disagree with the majority's result, I do agree with them that the government's intent in this case was not merely to reserve coal that was commercially exploitable in 1909-10. Thus, *Hoge* and the other state cases present different inquiries and different rules of construction than those at work in this case. Thus, as the panel said the first time around, they have extremely limited value here.

The majority's reliance on the lack of CBM-extraction technology to conclude that Congress may have thought of CBM as an integral part of coal also reveals an unresolvable internal conflict in the majority's reasoning, specifically between parts II.B. and II.C.2 of its opinion. In Part II.B, the majority concludes that the 1909 Congress's specific intent with regard to CBM is ambiguous. In so concluding, the majority relies on the fact that in 1909, it was technologically impossible to separate CBM from coal without destroying the coal. *See* Maj. Op. at 26 ("It is not reasonable to impute to Congress a desire to retain only solid rock coal . . . when CBM is an integral component of coal and in 1909 there appears to have been no technology by which a patent holder could extract and capture CBM from coal without damaging or destroying the coal."). The majority argues, in short, that the lack of technology shaped the way Congress thought about coal and CBM in 1909.

In Part II.C.2, however, the majority reverses its position completely. Seeking to explain Congress's "general intent," the majority finds that Congress intended to capture the entire future value of the coal that it reserved. Therefore, the court, in putting forth its case that CBM is part of the economic value of coal, relies on an assertion that Congress knew there would be technological ad-

vances in the coal mining field, and that Congress intended to take advantage of those technological advances. *See* Maj. Op. 38 ("Congress adopted an interpretation of coal which encompassed both the present and future economic value of coal for energy purposes, including value that could only be realized through advances in technology such as those which drive the present day exploration for CBM."). The majority never explains how it can state that the lack of technology in 1909 shaped Congress's view of CBM, and yet later rely on the fact that Congress anticipated technological advances to explain how Congress thought about CBM. If Congress anticipated technological advances such as those that make CBM mining possible today, the lack of mining technology in 1909 should not have had any effect on its ability to conceive of CBM and coal as two separate entities.

I agree that the 1909 Act envisioned technological advances affecting the coal mining industry. Thus, as the majority points out, Congress reserved to itself coal that was not economically useable in 1909 and 1910. Nonetheless, that does not change the fact that there is a limit on the natural and plain meaning of the term coal. The meaning of coal does not include CBM, regardless of technologies that make it available or unavailable.

III.

In 1909, people thought of gases and solids as separate entities. Their understanding was no different with regard to the relationship between coalbed methane—a dangerous gas emitted from coal mines—and coal itself. Coal, as used in the Coal Lands Acts of 1909 and 1910, has a plain meaning that does not include CBM. The majority attempts to create an ambiguity through analysis of the scientific process that keeps some of the CBM layered on the solid coal. For the reasons stated above, that analysis confirms the plain understanding rather than contradicting it. Because I find no ambiguity in the statute, I see no reason to invoke the rule that calls for interpreting ambiguities in a federal reservation in favor of the government.

I respectfully dissent.

Anderson, J. and Baldock, J., join in this dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-1579

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Appellant,

v.

AMOCO PRODUCTION COMPANY; SHIRLEY K. ADAMS; HENRY ASHWORTH; CARLA M. ASPAAS; ERIC K. ASPAAS; HELEN RUTH ASPAAS; LAURA BELLE ASPAAS; LETA M. ADKINS; RITA M. ADKINS; MAXWELL C. ANDERSON; EARL A. BARKER; MAURICE C. BREEN, named as: Heirs of Maurice C. Breen, deceased; HORACE F. BUCHANAN, named as: the Heirs of Horace Buchanan, deceased; GEORGE A. BUGG; CARBONE INVESTMENT COMPANY; JACK CARMACK; ROWLAND CARMACK; JOSEPH C. CIANCIO; WILLIAM KEMP CLARK; COLORADO NATIONAL BANK, George Veto Trust; COLORADO NATIONAL BANK OF LONGMONT, conservator Gladys N. Frazzini; DOROTHY A. CORGIN; KELLY COX, named as: the Heirs of Kelly Cox, deceased; A.B. CROSBY; BARBARA CROSBY; DAVID CROSBY; JOHN CROW, JR.; MARGARET CROW; MANUEL CRUZ; LOUIS M. CUMMINS; FREDERICK E. DICKERSON; J.M. EAKES; ROBERT MCFERRAN EAKES; MARGARET ELLISON; SALLY M. ETTERBECK; MINNIE FLAKS; TILLIE FLAKS; CASSIO FRAZZINI; ADELE FROST; ROBERT GALBASIN; ABEL S. GALLEGOS; MONTEY GARNAND; RUBY GIBBS GOGGANS; CHRISTINE HAMILTON; HARDIN SIMMONS UNIVERSITY; H.A. HARMON, named as: the Heirs of H.A. Harmon, deceased; HONDO OIL & GAS COMPANY, named as: the shareholders of Hondo Oil & Gas Company (dissolved); HYDE OIL AND GAS CORPORATION;

CHARLES KETTERING; FIDEL LUCERO; RICHARD C. MALCOMB; SUZANNE HEATH MANGES; CATHERINE B. MCELVAIN; MABEL MCELVAIN; THORNTON H. MCELVAIN, JR.; DOROTHY N. MCKELVEY; EDWIN L. MCKELVEY; R. FRANKLIN MCKELVEY; W.R. MCMAHON; MCMURRY OIL COMPANY; W. CLAY MEREDITH CHARITABLE TRUST; W.A. MONCRIEF, named as: the Heirs of W.A. Moncrief, deceased; ROY E. MONTGOMERY, personal representative for the Estate of W. Clay Meredith, deceased; FORREST D. MILLER, named as: the Heirs of Forrest D. Miller, deceased; HELEN L. MILLER, named as: the Heirs of Helen L. Miller, deceased; THOMAS S. MORRISSEY; THOMAS J. MORRISSEY; EMIL MOSBACHER; EMIL MOSBACHER, III; JOHN DAVID MOSBACHER; R. BRUCE MOSBACHER; MYRA THERESA MOULDS; NORTH CENTRAL OIL CORPORATION; H.L. OLIVER; CLARA ONOFRIO; MARGARET C. PARGIN; HAROLD F. PAYNE, JR.; NEVILLE G. PENROSE; BEN M. PETERSON, JR.; FREDERICK PETROCCO; PHILLIPS PETROLEUM COMPANY; JAMES M. RAYMOND; W.E. RENNIE, named as: the Heirs of W.E. Rennie, deceased; THOMAS C. ROMOLO; BENTON E. SMULLYEN; CLINTON I. SMULLYEN; WILLIAM STIRLING; J.L. TATUM, named as: the Heirs of J.L. Tatum, deceased; ANNA CARLEO TOMEO; ERNEST TOMEO; TURNER SECURITIES; RICHARD W. TURNER, SR.; GEORGE C. VANCE, named as: the Heirs of George C. Vance, deceased; ANTHONY H. VETO; JOSEPH F. WARE, JR.; ALBERT E. ZARLENGO; ANTHONY F. ZARLENGO, John Doe and all other unknown persons claiming an interest in the mineral estate located within the N/2 of section 12, T33N, R8W, N.M.P.M., La Plata County, Colorado; AMAX OIL & GAS, INC.; BOWEN/EDWARDS ASSOCIATES, INC.; FUEL RESOURCES DEVELOPMENT COMPANY; MCKENZIE METHANE CORPORATION; MERIDIAN OIL, INC.; MOBIL OIL CORPORATION; NATIONAL COOPERATIVE REFINERY ASSOCIATION; NORTHWEST PIPELINE CORPORATION; PABLO OPERATING COMPANY; PALO/EAGLE JOINT

VENTURES; RICHMOND PETROLEUM, INC.; WILLIAMS PRODUCTION COMPANY; UNION TEXAS PETROLEUM CORPORATION, John Doe oil company and all other unknown persons or entities claiming leasehold working interests or operating rights to explore for, produce or develop coalbed methane or coal constituents from coal or coal strata reserved by the United States in patents issued under The Act of June 22, 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservation, and which entities have not obtained tribal consent to and federal approval of said exploration, production or development activities; MANUEL LUJAN, JR., Secretary of the United States Department of the Interior; DEPARTMENT OF INTERIOR, and its subordinate agencies; BUREAU OF INDIAN AFFAIRS; BUREAU OF LAND MANAGEMENT; MINERALS MANAGEMENT SERVICE; EDDIE F. BROWN, Assistant Secretary of the Bureau of Indian Affairs; CATHERINE FRANCES MCELVAIN HARVEY; DELOS CY JAMISON, Director of the Bureau of Land Management; and SCOTT S. SEWELL, Director of the Minerals Management Service; Class of Defendants situated similarly to those named non-governmental defendants who claim ownership of an interest in coalbed methane and other coal constitutents or claim the right to explore for, develop or produce those substances from coal or coal strata reserved by the United States in patents issued under the Act of March 3, 1909, or the Act of June 22, 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservation and which class members have not obtained tribal consent to and federal approval of said interests of rights; JACK BALLE; J.M. HUBER CORPORATION, Oil & Gas Division; MARY JEAN BALLE; DONALD C. CIANCIO; SUSIE M. CIANCIO; NCNB TEXAS NATIONAL BANK, as Trustee of the Kelly Cox Testamentary Trust; ADDIE G. CROSBY; JACK W. CROSLAND, JR.; HENRY L. ENOCHSON; MARY JANE ENOCHSON; J.L. GOGGANS; LIBERTY TULSA, as trustee of the

Christine J. Hamilton Trust; HELEN CROSLAND HENDRICKS; THOMAS L. JOHNSTONE; JAMES ERIC KAINDL; LARRY JAMES KAINDL; LISA JEAN KAINDL; JANE P. MOSBACHER, named as The Heirs of Jane P. Mosbacher, Deceased; PM ASSOCIATES, a Colorado general partnership; FIRST INTERSTATE BANK OF DENVER, as Co-trustee of the Estate of W.E. Rennie est W.E. Rennie; RODERICK L. TURNER; WELLS FARGO BANK, as trustee of the George C. Vance Trust; ALBERT E. ZARLENGO, JR., as trustee for the Albert E. Zarlengo Trust; BELL SOUTH CORPORATION HEALTH CARE TRUST; J. MAGNESS, INC.; SG INTERESTS I, LTD; MOSBACHER U.S.A., INC.; LAND OWNERS COALSEAM COMMITTEE,

Defendants-Appellees,

TIFFANY GAS COMPANY,

Defendant.

Appeal from the United States District Court
for the District Court of Colorado
D.C. No. 91-B-2273

Before SEYMOUR, Chief Judge, COFFIN * and MCKAY, Senior Circuit Judges.

SEYMOUR, Chief Judge.

The Southern Ute Indian Tribe (the Tribe) appeals the district court's grant of summary judgment to defend-

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* The Honorable Frank M. Coffin, United States Senior Circuit Judge for the First Circuit, sitting by designation.

ants Amoco Production Company and others on the Tribe's claim to ownership of coal bed methane (CBM) contained in coal acquired by the Tribe as successor in interest to a statutory reservation of coal to the United States. The Tribe also appeals the district court's grant of summary judgment to the Secretary of the Interior, the Department of the Interior, and the Department of the Interior's subordinate agencies (the federal defendants) on the Tribe's claim of breach of fiduciary duty. We reverse the district court on the issue of CBM ownership and remand for further proceedings consistent with this decision.[1]

I.

In 1991, the Tribe brought suit against Amoco Production Company, other oil companies, and individual oil and gas lessees and lessors (the Amoco defendants) who asserted ownership interests in CBM contained in coal owned by the Tribe. In its First Amended Complaint, the Tribe claimed ownership of CBM and asserted that various Amoco defendants, by exploring for and extracting CBM under oil and gas leases, had among other things: 1) trespassed on Tribal lands; 2) trespassed on Tribal coal; 3) converted Tribal coal; 4) failed to pay severance tax to the Tribe; and 5) in collusion with State of Colorado officials, deprived the Tribe of federally guaranteed rights in violation of 42 U.S.C. § 1983. The Tribe sought a variety of remedies including: 1) a declaratory judgment vesting in the Tribe ownership of CBM and other substances contained in Tribal coal; 2) a declaratory judgment that Tribal consent is required for CBM extraction; 3) an order quieting title to CBM in the Tribe; 4) injunctive relief to prevent continued exploration and production of CBM without Tribal consent; 5) damages for present and future injuries to coal, for extraction of

[1] Our reversal will require the district court to address the defenses asserted by defendants to preclude recovery by the Tribe, at least some of which appear to raise issues of serious magnitude.

CBM, for conversion of coal, for civil rights violations, and for failure to pay severance taxes; 6) title to all exploration and production facilities on Tribal lands which, if removed, would interrupt production of CBM; and 7) costs and attorney's fees.

The Tribe also sued the federal defendants in their capacities as trustees for the Tribe. The Tribe claimed that the federal defendants breached their fiduciary duties to the Tribe by allowing exploration and extraction of CBM under oil and gas leases. The Tribe sought a declaratory judgment on the breach of fiduciary duty issue, and sought injunctive relief to prevent the federal defendants from issuing permits to explore for and extract CBM under oil and gas leases or from otherwise acquiescing in the derogation of the Tribe's alleged ownership interest in CBM.

Two issues were identified as fundamental to the resolution of all claims against the Amoco defendants: 1) the determination of CBM ownership, and 2) the existence of and applicability of defenses based on acts or omissions of the Tribe. Since resolution of either issue in favor of the Amoco defendants would settle all claims, the district court granted a joint motion by the Tribe and Amoco to bifurcate these issues. The parties then moved to certify "a defendant class comprised of all persons, except the Tribe and governmental entities, who claim an ownership interest in the coalbed methane" for the purposes of resolving the bifurcated issues. Aplt.'s App., vol. I at 214. Amoco was designated as representative of the class and, in that capacity, brought a motion for summary judgment on the bifurcated issues. *Id.*, vol. II at 353.

The federal defendants supported the Amoco defendants' claim of ownership of CBM and asserted accordingly that they had no fiduciary duty to manage an asset for the Tribe which it did not own. The federal defendants filed a motion for summary judgment based on the Tribe's nonownership of the CBM. In the alternative,

they moved to dismiss the Tribe's action as time-barred. *Id.* at 365. The Tribe brought a cross-motion for summary judgment on the issue of CBM ownership.

The district court held that CBM ownership was vested unambiguously in the Amoco defendants. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F.Supp. 1142, 1160 (D.Colo.1995). Consequently, the court concluded it "need not address further the application of the common defenses to the ownership question," *id.* at 1160, or reach the federal defendants' claims that the Tribe's action was barred by the statute of limitations, *id.* at 1161. It then granted summary judgment to the Amoco defendants on the issue of CBM ownership, and to the federal defendants on the "issue of breach of fiduciary duty for failure to manage the CBM gas," leaving for later determination other issues concerning fiduciary duty. *Id.* The court denied the Tribe's motion for summary judgment. *Id.* It is from these rulings that the Tribe appeals.[2]

II.

The single issue which is determinative of this appeal is whether the Tribe, as successor in interest to a statutory reservation of coal to the United States made in the coal lands acts of 1909 and 1910, is also the owner of CBM, a gaseous substance contained in coal. "We review a grant of summary judgment de novo, applying the same legal standard used by the district court under Fed.R. Civ.P. 56(c)." *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir.1995). Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is due judgment as a matter of law. *Id.* We construe the facts and record in the light most favorable to the party opposing the motion. *Id.* "We also review de novo the district court's interpretation of a federal

[2] The district court certified its judgment for immediate appeal under Fed.R.Civ.P. 54(b).

statute." *Id.*; *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir.1990).

Determination of CBM ownership where the Tribe has acquired its coal via a statutory reservation to the United States presents a question of statutory interpretation. The purpose of statutory construction is to determine congressional intent. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) ("Our task is to give effect to the will of Congress. . . ."). We must decide whether Congress intended to reserve CBM to the United States (and thus to the Tribe as its successor in interest) as part of the coal reservations in the 1909 and 1910 Acts, or whether Congress intended that CBM be treated as part of the unreserved estate (belonging to the Amoco defendants' predecessors in interest).[3]

Of critical importance is the long recognized principle of statutory construction, applicable here, that "ambiguity or uncertainty in the terms employed [in land grants] should be resolved in favor of the government." *Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 680, 34 S.Ct. 907, 912, 58 L.Ed. 1527 (1914). It is an " 'established rule that land grants are construed favorably to the Government, that *nothing passes except what is conveyed in clear language*, and that if there are doubts they are resolved for the Government, not against it.' " *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59, 103 S.Ct. 2218, 2231, 76 L.Ed.2d 400 (1983) (quoting *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 687, 1 L.Ed.2d 693 (1957)) (emphasis added) (concluding that gravel is included in mineral reservation to the United States). The burden remains on defendants here to dispel any ambiguity in the construction of the coal reservation.

[3] We consider *infra* part II D, and reject, defendants' alternative argument that if Congress' intent is not clearly expressed we must defer to the Department of the Interior's statutory construction.

A. Plain Meaning of the Statutes

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988). "In interpreting statutes, we begin with the relevant language." *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir.1990). Where the will of Congress "has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' " *Griffin*, 458 U.S. at 570, 102 S.Ct. at 3250 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)).

The relevant part of the 1909 Act states that "[a]ny person . . . shall . . . upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, *which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.*" 30 U.S.C. § 81 (emphasis added) (hereinafter the 1909 Act).[4] The 1910 Act similarly states that a pros-

[4] In full, the Act states:

> Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, *which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.* The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without the previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. The owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit. Nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has made or shall make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.
>
> 30 U.S.C. § 81 (emphasis added).

pective homestead entrant's "patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same." 30 U.S.C. § 85 (hereinafter the 1910 Act).

The Acts neither define coal nor mention CBM; thus, the statutes do not by their plain language indicate congressional intent regarding CBM. Even in the absence of a plain articulation, however, we have other means available to evaluate congressional intent. *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-48, 107 S.Ct. 1207, 1212-22, 94 L.Ed.2d 434 (1987). Following this circuit's traditional approach as developed in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), and followed in *Aulston*, 915 F.2d at 589-599, we use traditional tools of statutory construction to investigate whether inclusion of CBM in the coal reservation was either specifically intended by Congress, or is consistent with Congress' general legislative purpose in enacting the 1909 and 1910 Acts.

B. Specific Congressional Intent

Congress' specific intent to include or exclude CBM in its reservation of coal must be judged from the perspective of Congress at the time of enactment of the 1909

and 1910 Acts. From that perspective, the Amoco defendants argue that we can easily discern Congress' specific intent. First, they argue that in 1909 coal was typically defined as a solid rock, without specific mention of gaseous constituents. Amoco Br. at 17; *Amoco Prod. Co.*, 874 F.Supp. at 1153. Second, they contend that in 1909 Congress was aware of CBM as a hazardous gaseous byproduct of coal and could specifically have retained the CBM by inserting the word "gas" in the mineral reservation had it so wished. From these facts defendants conclude that Congress' use of the word "coal" in its mineral reservation was not inadvertent, and that Congress specifically chose to reserve only solid rock coal.[5]

We might agree with Amoco if we were construing a contemporary reservation in the light of the present commercial value of CBM and the relative ease of its extraction. But our task is to try to discern the intent of Congress almost three quarters of a century ago. Even if Congress intended to retain only solid rock coal, in 1909 Congress may have considered CBM to be part of that solid coal. CBM is generated as part of the chemical and physical processes which convert carbon-rich sediments into solid coal (coalification). J. Hovey Kemp & Kurt M. Petersen, *Coal-Bed Gas Development in the San Juan Basin: A Primer for the Lawyer and Landman*, 1988 ROCKY MTN. ASS'N OF GEOLOGISTS 257, 259. In this respect, CBM is like other hydrocarbon gases which are similarly generated by the compaction and chemical alteration of carbon-rich source rock. But, unlike hydrocarbon gases which are mobile (fugacious) and are typically found trapped in reservoir rocks distant from their source rocks, the CBM at issue in this case is still trapped in the rock with which it was generated. It is trapped by

[5] The federal defendants have adopted the Amoco defendants' arguments on the issue of CBM ownership. Federal Br. at 28.

adsorption[6] "on the internal surface of micropores," and as "free gas in cracks and fractures."[7] *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 Interior Dec. 538, 540 n. 11 (1981) (quoting Deul, *Methane Drainage from Coal Beds, A Program of Applied Research*, 60 ROCKY MTN. COAL MINING INST. 13 (1964)). CBM which is trapped in coal *cannot* migrate away from the coal.

Furthermore, although CBM in a gaseous state can be produced from coal, prior to that production most CBM is not, *in situ*, a "gas" within the typical physical definition of the term.[8] It is not sufficiently like other natural gases for us to conclude that Congress unambiguously intended the owners of other natural gases to also own CBM associated with the reserved coal. The adsorbed component of CBM is molecularly bound to the coal and cannot be released without an alteration in the physical state of the coal. In fact, release of either adsorbed or fracture-trapped CBM requires production techniques which often cause significant damage to the coal.[9] CBM ownership,

[6] Adsorption is "adhesion in an extremely thin layer of molecules . . . to the surfaces of solid bodies or liquids." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 16 (10th ed.1993).

[7] At issue here is the ownership of CBM trapped in and produced from the coal reservoir. We do not address ownership of CBM generated by the coalification process that may have migrated away from the coal into adjacent non-coal strata.

[8] A gas is "a fluid substance with the ability to expand indefinitely." THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 550 (1995). CBM which, as here, cannot expand without inducing a physical change in its reservoir, cannot be considered a natural gas in the typical sense.

[9] Adsorbed CBM, which comprises most of the "gas" within coal, can be economically produced only by techniques which artificially induce changes in the coal reservoir. *See, e.g.*, Jeff L. Lewin et al., *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 W. VA. L.REV. 563, 573, 576-583 (1992) (discussing vertical-boreholeinduced pressure changes, hydrofracturing, and horizontal drilling).

therefore, cannot be disposed of by the simple tautology that gas is gas. We are concerned not with the physical state of the substance as gas at the surface when it is produced, but rather with its physical state prior to extraction, as trapped in coal. Even assuming Congress specifically intended to retain only solid rock coal, that solid rock coal is the source for and traps CBM. Because CBM is an integral part of the coal, Congress could certainly have considered it part of the solid rock.[10] Indeed, it seems to us quite unlikely that Congress, if it had considered the matter, would have reasoned, "We want the Government to hold on to the solid bituminous core of these coal deposits, but we make no claim to the thin layer of molecules of CBM which coats the surfaces."

Moreover, we disagree that a specific intent to retain only solid rock coal was evinced by Congress' awareness that CBM was occasionally released as a hazardous by-product of coal mining. CBM was not readily severable from coal in 1909 even though it is now "potentially severable" through application of advanced drilling and production technologies.[11] *See* Kemp & Petersen, *supra*, at

[10] In fact, by 1909, scientists understood that gas within coal was a constituent of coal which was generated by the coalification process. *See* Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust*, U.S. Geol. Surv. Bull. 383, H.R. Doc. No. 59-823, at 16 (1909) ("The ultimate source of the gases [within coal] . . . has arisen from the slow decomposition of organic matter as a by-product in the process which has converted vegetable humus into coal.").

[11] Congress almost certainly knew in 1909 that gas could be extracted from coal. The coal degasification practiced in 1909 was, however, a different process than the CBM drilling at issue in this case. Coal degasification required mining and extraction of coal, then releasing the gas by mechanically crushing the coal, Chamberlin, *supra* note 10, at 17, or heating it, LARRY L. ANDERSON & DAVID A. TILLMAN, SYNTHETIC FUELS FROM COAL § 3.1.1, at 31 (1979). Because these processes of degasification necessarily resulted in damage to or destruction of the coal, they could only be employed by the owner of the coal. Accordingly, the value of the

261 ("Due to technical advances and changes in the world energy supply, the recovery and utilization of coalbed gas now appears to be more feasible."). It is not reasonable to impute to Congress a desire to retain only solid rock coal constituents and to convey gaseous coal constituents when CBM is an integral component of coal and in 1909 there appears to have been no technology by which a patent holder could extract CBM from coal without damaging or destroying the coal. Because no effective means existed in 1909 to remove CBM leaving the coal behind, CBM physically trapped in coal was necessarily retained with the coal reservoir.

The fact that CBM could not be commercially extracted from coal in 1909 indicates to us it is inappropriate to conclude that Congress intended a specific result one way or the other regarding CBM by its use of the word "coal." Rather, we conclude that where the commercial value of CBM was unappreciated at the time of the enactment, the text of these acts gives us no particular indication of Congress' *specific intent* with regard to that asset. *See United States v. Union Oil Co. of California*, 549 F.2d 1271, 1273 (9th Cir.1977) ("Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to them."); *Northern Natural Gas*, 441 F.2d at 714-15 (no specific intent to exclude helium will be inferred where lessors neither knew of presence nor appreciated

gas extracted necessarily belonged to the coal owner. CBM drilling, on the other hand, for the first time allows CBM to be released from coal without bringing large volumes of coal to the surface. The technique is typically employed where the coal is deeply buried and thinly bedded and cannot be economically mined. The advent of the drilling technologies employed today to extract CBM while leaving most of the coal relatively undisturbed, *cf.* Lewin, *supra* note 9, at 593-597 (the primary concern with CBM drilling is *in situ* damage to coal reserves), creates an apparent conflict in ownership of CBM that did not exist in 1909 and 1910.

value of helium gas); *cf. Aulston*, 915 F.2d at 594, 599 (rejecting argument that use of "gas" in mineral reservation evinced a specific congressional intent to exclude carbon dioxide from a gas reservation, when inclusion comported with general intent of statute and value of carbon dioxide was not appreciated at time of mineral reservation).

We are thus unable to conclude that Congress formed a specific intent to convey CBM as a gas given the uncertainty that Congress viewed CBM as a component distinct from solid rock coal, knew CBM was severable, knew that it had a value, and purposefully chose to reject that value. As a consequence, we are persuaded that the 1909 and 1910 Acts are ambiguous with respect to Congress' specific intent regarding CBM. *Cf. Western Nuclear, Inc.*, 462 U.S. at 56, 103 S.Ct. at 2229-30 (noting that the term "mineral" is ambiguous with respect to congressional intent to reserve gravel as a mineral). In the absence of specific congressional intent, we look at the general purpose of the statute and the historical context in which it was enacted to determine congressional intent. *Aulston*, 915 F.2d at 598. "General intent should be discovered . . . by considering the purposes of the grant in terms of enjoyment of the rights created." *Northern Natural Gas*, 441 F.2d at 714. "In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable." *Id.* at 715.

C. General Congressional Intent

"In interpreting the relevant [statutory] language . . . we look to the provisions of the whole law, and to its object and policy." *Aulston*, 915 F.2d at 589; *see also United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir.1993). "[W]e look at not only the statute itself but also at the larger statutory context. We may ascertain the intent of Congress through statutory language and

legislative history." *Utah v. Babbitt*, 53 F.3d at 1148 (citations omitted).

1. History

To understand the general congressional intent behind the 1909 and 1910 Acts, we review the historical context in which they were enacted, including the history of the Southern Ute Tribe's acquisition of its reservation lands and the United States' reservation of the coal it ultimately conveyed to the Tribe. We begin in the latter half of the nineteenth century with the formation of the Southern Ute Indian Reservation.

The Ute Indian Reservation was established in 1864, when the Uncompahgre, White River and Southern Utes "exchanged their aboriginal lands in New Mexico, Utah, and Colorado for . . . approximately 15.7 million acres . . . within Colorado." *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162, 91 S.Ct. 1336, 1338, 28 L.Ed.2d 695 (1971). The reservation did not long remain intact. In 1874, 3.7 million acres of the reservation were ceded to the United States upon discovery of mineral resources on reservation land. *Id.* In 1880, the remaining reservation land was ceded to the United States in return for individual allotments and "shares in the proceeds of unallotted land sales." *Id.* at 164, 91 S.Ct. at 1339 (quoting *United States v. Southern Ute Tribe or Band of Indians*, 191 Ct.Cl. 1, 423 F.2d 346, 350 (1970)). The Uncompahgre and White River Utes left the reservation before 1882. *Id.* at 162, 91 S.Ct. at 1338.

After the cession of reservation land, the United States opened the ceded, non-allotted reservation to homesteading and mineral exploration under the terms and conditions of a variety of federal statutes. *Amoco Prod. Co.*, 874 F.Supp. at 1148 (citing the Homestead Act of 1862, 43 U.S.C. §§ 161 *et seq.* (repealed 1976), the Coal Lands Act of 1873, 17 Stat. 607, and the Mining Law of

1872, 30 U.S.C.A. § 22). At that time, "the disposition of land owned by the United States depended upon whether it was classified as mineral land or nonmineral land, and title to the entire land was disposed of on the basis of th[at] classification." *Western Nuclear, Inc.*, 462 U.S. at 47, 103 S.Ct. at 2225. Because the United States Geological Survey had insufficient resources to evaluate the mineral character of each land parcel before patent issuance, it often depended on the attestation of a patent applicant to determine the character of his land. *Id.* at 48 n. 9, 103 S.Ct. at 2225 n. 9. Although this honor system for patent evaluation inevitably led to considerable abuse, agricultural settlement and mineral exploration of reservation lands and other areas in the western United States proceeded for several decades under this system.

In 1906, President Roosevelt withdrew from homesteading or mineral patenting approximately 64 million acres considered to be valuable for coal resources, including the ceded, non-allotted Ute Reservation lands. *Id.* at 48-49, 103 S.Ct. at 2225-26 (citing 41 CONG. REC. 2615 (1907)). Two concerns drove the withdrawal of coal lands: first, the government wished to end the issuance of patents in reliance on an entrant's attestation of the mineral character of the land; and second, the government wished to encourage optimal land use by ensuring that lands valuable for mineral resources would not be held unavailable for mineral exploration by homesteading claims. *Id.* In his Sixth Annual Message to the nation, President Roosevelt explained that the withdrawal was necessary to preserve ownership of coal resources in the United States and to ensure price control of coal and disposition of the coal resources "under conditions which would inure to the benefit of the public as a whole." PRESIDENT THEODORE ROOSEVELT, SIXTH ANNUAL MESSAGE (Dec. 3, 1906), *reprinted in* XV THE WORKS OF THEODORE ROOSEVELT 363 (1926).

The 1906 withdrawal included lands on which the process of homesteading (holding the land for a term of

years in agricultural use in return for a land patent) had begun. Homesteaders who had entered the land in good faith, believing the land to be of non-mineral character, were disenfranchised by the withdrawal. To remedy that disenfranchisement while preserving the value of coal for future use of the United States, Congress enacted the 1909 Act. That act permitted existing good faith agricultural entrants whose land had been subject to the 1906 withdrawal to receive patents for those lands subject only to a "reservation to the United States of all coal in said lands." 30 U.S.C. § 81. In 1910, Congress enacted a similar statute for the protection of prospective agricultural entrants to federal lands. Under the protection of these Acts, the Amoco defendants' predecesors in interest claimed patents to land subject only to the reservation of coal in the United States.

Homesteading and mineral exploration proceeded under these statutes until 1934, when Congress changed its policy toward Indian Tribes and passed the Indian Reorganization Act (IRA), 25 U.S.C. §§ 463-479, which restored to tribal ownership some lands previously taken by the federal government. Congress provided that "[t]he Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934," subject to any outstanding rights or claims. *Id.* § 463(a). In 1938, pursuant to the 1934 Act, equitable title to coal held by the federal government on the Southern Ute Reservation was returned to the Tribe, subject to outstanding homestead patents. *Amoco Prod. Co.*, 874 F.Supp. at 1151.

2. Analysis

With this background, we turn to the general intent behind the 1909 and 1910 Acts. Defendants argue and the district court agreed, *Amoco Prod. Co.*, 874 F.Supp. at 1155-59, that, in attempting to preserve coal lands for the benefit of the public as a whole and to remedy the

negative impacts of the 1906 land withdrawals, Congress specifically considered and rejected a broad reservation of all minerals. From that rejection, defendants contend, we should infer that Congress knowingly chose the most narrow possible meaning of coal. Defendants rely on a passage of debate between a member of the House of Representatives from Texas and the Chairman of the Committee on Public Lands concerning the intended mineral reservation:

> Mr. STEPHENS of Texas. Could the gentleman better arrive at what he desires by only patenting the surface of the land and *reserving all minerals, precious and otherwise?*
>
> Mr. MONDELL. That has been discussed at some length, and *the Committee on Public Lands is not of the opinion that that ought to be done.* We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some *coals* of value.

43 CONG. REC. 2504 (1909) (emphasis added). Even bearing in mind the admonition that legislative history should be treated cautiously, *Exxon Corp. v. Lujan*, 970 F.2d 757, 761 (10th Cir.1992), it is clear that Congress recognized in 1909 it had the option to reserve "all minerals" and rejected that option.

Congress' rejection of an "all minerals" reservation, however, does not inform us about Congress' intent regarding the extent of the reservation of a single substance, "coal." Moreover, the quoted exchange between Representatives Stephens and Mondell does not bear the weight defendants would have us give it because the Committee affirmatively considered and rejected several other options, including no reservation of coal. Aplt.'s App., vol. VI at 1275, *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands*, 59th Cong., 2d. Sess. 17 (Dec. 17, 1906) (here-

inafter *Hearings*) (statement of Edgar E. Clark) (considering the use of government-imposed railroad rates to retain control of coal supply). The Committee also discussed and rejected the possibility of retaining only ownership of coal which was marketable in 1907. Aplt.'s App., vol. VI at 1286, *Hearings*, at 15 (Jan. 9, 1907) (statement of Marius R. Campbell); *id.* at 1281 (noting that the western coals at issue in this case were not mineable at that time and were "inferior to the eastern coals, particularly from a steaming and coking standpoint").

Rather than adopt any of those options, Congress chose to reserve "all the coal." *Id.* at 1287 (The "only really effective way to retain the balance of the coal in the public domain in public ownership . . . [was to] reserve the coal under the surface of all of the land. That would effectively retain in public ownership all the coal."). In so doing, the Committee was specifically informed it would retain coal that was not presently valuable, but which could become valuable in the future. *Id.* at 1281 ("[W]hat may not be coking [valuable] coal to-day may be coking coal to-morrow; because there are improvements going on."); *id.* at 1282 ("these [coals] may have a much greater value in the future").

It is apparent from the legislative history of the 1909 and 1910 Acts that Congress understood it had the option to reserve to the United States only coal having current economic value, and rejected that narrow mineral reservation. Congress knew there was indeterminate potential value in the reserved coal and intended to secure that value for the United States.[12] Rather than indicating a limited reservation of coal to the United States, the legislative history suggests that Congress adopted an in-

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[12] Moreover, we cannot believe that Congress would have countenanced ceding CBM to surface patentees, *see infra* note 13, knowing that degasification at the time would have involved damage to and possibly destruction of the very resource sought to be reserved. *See supra* note 11.

terpretation of coal which encompassed both the present and future economic value of coal, including value that could only be realized through advances in technology such as those which drive the present day exploration for CBM.

Congress' broad general intent and the absence of a clear conveyance of CBM to the surface patentees,[13] coupled with the principle of statutory construction that resolves ambiguity in favor of the sovereign, persuades us that CBM was reserved to the United States.

3. Related Statutes

Our conclusion that the reservation of coal should include CBM is buttressed by the interpretation given to analogous statutory mineral reservations. The same principle we rely on here, that ambiguity or uncertainty in the terms employed in land grants should be resolved in favor of the government, has been a subtext in the interpretation of many similar statutes reserving minerals to the United States.

In 1914, Congress enacted the Agricultural Entry Act, 30 U.S.C. §§ 121-125 (hereinafter the 1914 Act), reserving "phosphate, nitrate, potash, oil, gas, or asphaltic minerals" to the United States, *id.* § 121. Then in 1916, Congress enacted the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (hereinafter the 1916 Act), which reserved to the United States "all the coal and other minerals," *id.* § 299. Uniformly, courts have treated these mineral reservations expansively. *Western Nuclear, Inc.*, 462 U.S. at 60, 103 S.Ct. at 2231-32 ("gravel is a mineral reserved to the United States in lands patented under" the 1916 Act); *Aulston*, 915 F.2d at 585 (reservation of "gas" in the 1914 Act includes carbon dioxide); *Union Oil Co.*, 549 F.2d at 1279 (geothermal energy in-

[13] "Surface patent" is used throughout this opinion to indicate the surface estate patented to agricultural entrants under the 1909 and 1910 Acts, which estate included all minerals other than coal.

cluded in 1916 Act's reservation of "all the coal and other minerals"); *Brennan v. Udall*, 379 F.2d 803, 804 (10th Cir.1967) (oil shale included in 1914 Act reservation of oil). Although the language employed in the 1914 and 1916 reservations is more expansive and admits more variety in type and character of mineral reservation than the language used in the 1909 and 1910 Acts, judicial interpretations of these statutes have reached for the outer limits of reasonable construction in favor of the sovereign. A particularly notable example is one court's classification of geothermal energy (hot water and steam) as a "mineral." *Union Oil Co.*, 549 F.2d at 1279. In fact, we have found no occasion in which a reservation of a mineral asset to the United States has been treated narrowly to exclude a newly appreciated value associated with that mineral; the cases cited above offer no support for doing so now.

In addition to the general principles of statutory construction on mineral reservations, we also have some specific guidance from Congress on the interpretation of the 1909 and 1910 Acts. In 1955, to aid exploration and extraction of uranium and other source materials[14] in coal reserved to the United States by the 1909 and 1910 Acts, Congress enacted legislation to control "Entry and Location on Coal Lands on Discovery of Source Material." 30 U.S.C. §§ 541-541i (hereinafter the 1955 Act). The 1955 Act granted to the patent holder of lands in which the United States reserved a coal interest the "exclusive right to mine, remove, and dispose of lignite [coal] containing . . . source material [uranium and other

[14] Source material, as used in the 1955 Act, means "uranium, thorium, or any other material which is determined by the Atomic Energy Commission . . . to be source material." 30 U.S.C. § 541e. Source material is used in production of special nuclear material; a mineral is classified as source material if the Atomic Energy Commission determines that the material is "essential to the production of special nuclear material" and that the classification is in the "interest of common defense and security." 42 U.S.C. § 2091.

similar minerals] . . . subject to the reporting and payment requirements of section 541." *Id.* § 541c. The right to extract coal to obtain uranium was granted for all federal coal lands, "*except*[] lands embraced within a coal prospecting permit or lease." *Id.* (emphasis added).

The Amoco defendants consider the legislative history of the 1955 Act relevant to our determination of CBM ownership. They quote a 1955 House Report which discusses the rights of surface patent holders who acquired their interests under the 1909 and 1910 Acts:

> The entryman or owner of any land, . . . with respect to which only the coal deposits have been reserved to the United States, heretofore has been presumed to have possessed fee simple title to all other minerals in the land, including valuable source minerals, regardless of the host material or the mode of occurrence.

H.R. REP. No. 84-1478 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2992, 2996. Amoco argues this legislative history supports their contention that, in 1955, Congress recognized the right of surface patent holders to exploit minerals contained in coal, and therefore the right to exploit CBM must be similarly granted to surface patent holders.[15]

First, Amoco's assertion that the surface patent holder has the right to "all other minerals" begs the question of

[15] Congress' allocation of the right to extract uranium in coal cannot be fully equated to the CBM at issue in this case because uranium is not invariably included in coal as part of the coalification process and because the 1955 Act does not purport to apply to nonfederal lands. Congress' determination of the respective rights of the surface patent holder and the United States in the 1955 Act is nevertheless instructive in the case at bar. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8, 100 S.Ct. 1932, 1938 n. 8, 64 L.Ed.2d 593 (1980) ("[W]hile arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.").

whether CBM is a mineral distinct from coal. Moreover, Amoco's interpretation of the legislative history of the 1955 Act is not the only interpretation the enactment will bear. We think the legislative history of the Act merely acknowledges a presumption that surface patent holders generally had the right to extract source minerals. The fact that Congress ultimately decided it must pass a statute to grant the surface patentees rights to uranium suggests that Congress did not believe the presumption extended to source minerals contained in federally owned coal. Moreover, Congress granted no right to extract uranium from coal where the United States had previously conveyed a coal lease. 30 U.S.C. § 541c. Congress' protection of existing coal leases also suggests that the 1955 Congress viewed the reservation of coal under the 1909 and 1910 Acts to encompass minerals such as uranium imbedded in coal.

The 1955 Act comports with a Congressional view that an imbedded mineral like uranium was part of the 1909 and 1910 Act coal reservations. That view applies with even greater force to integral components of coal like CBM, and if anything, convinces us that the 1955 Congress would resolve doubts regarding the 1909 and 1910 coal reservations, as we have here, in favor of the sovereign.[16]

[16] Amoco also relies on a 1933 House of Representatives' report to suggest that Congress has recognized dual ownership between the United States and agricultural patent holders when reserved minerals are found commingled with unreserved minerals. Amoco Br. at 23-24 (citing H.R. REP. No. 72-1938, at 2 (1933)). The House report and the subsequently enacted 1933 Act, which consolidated in the United States ownership of commingled sodium and potash, 30 U.S.C. § 124, do not particularly inform us about the 1909 and 1910 coal reservations, and certainly do not persuade us to ignore our mandate to resolve doubts and ambiguities in the 1909 and 1910 coal reservations in favor of the sovereign.

4. Summary

In summary, the direct legislative history of the coal lands acts indicates that Congress intended a reservation of coal that encompassed both the present and future economic value of coal. Congress was aware that full economic realization of that benefit would require advances in technology. Present day exploitation of CBM is a benefit of coal ownership that is consistent with Congress' general statutory intent. Given the limited value attributed to CBM in 1909 and 1910, we cannot infer that Congress intended to convey to the surface patent holder a component of coal which could not be severed from coal at the time of the statutes' enactments. In 1955, Congress itself recognized the supervening rights of coal owners in cases of dual mineral assets such as uranium and lignite. Lastly, courts have consistently construed mineral reservations in favor of the United States. These factors persuade us that Congress intended in the 1909 and 1910 Acts a broad definition of coal, and that CBM trapped in coal is included in the reservation of coal to the United States.[17]

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[17] The Tribe, the Amoco defendants, and the federal defendants have cited state court cases which have considered ownership of CBM. As interesting as these cases are (four of five deciding ownership of CBM is in the coal owner), they are not dispositive of the case at bar. The state cases construe CBM ownership in the context of common law deeds, which are negotiated conveyances with specific rules and presumptions of construction. These cases ultimately have little to offer in terms of our interpretation of Congressional intent in the 1909 and 1910 Acts. *See, e.g., NCNB Texas Nat'l Bank, N.A. v. West*, 631 So.2d 212 (Ala.1993) (coal owner has ownership rights of CBM contained in coal and gas owner had rights to any CBM which has migrated away from the coal reservoir); *Vines v. McKenzie Methane Corp.*, 619 So.2d 1305 (Ala. 1993) (ownership of CBM was included in grant of "all coal"); *Rayburn v. USX Corp.*, No. 85-G2661-W, 1987 U.S. Dist. LEXIS 6920 (N.D.Ala. Jul. 28, 1987) (coal owner, USX, is owner of right to explore for and to extract occluded CBM where grantor of deed retained only oil and gas rights); *United States Steel Corp. v. Hoge*, 503 Pa. 140, 468 A.2d 1380 (1983) (coal owner has right to CBM). *But cf. Carbon County v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680 (1995) (right to extract CBM is with holder of gas exploration rights).

At this juncture, our statutory interpretation is complete and we would normally conclude our analysis. But defendants raise one last issue regarding CBM ownership which demands our attention: the 1981 Department of the Interior Solicitor's Opinion.

D. 1981 Department of the Interior Solicitor's Opinion

In 1981, the Solicitor of the Department of the Interior promulgated an opinion entitled *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 Interior Dec. 538 (1981) (hereinafter Solicitor's opinion), in which the Solicitor construed the meaning of "coal" in the 1909 and 1910 Acts and concluded that "a reservation of 'coal' does not include coalbed gas." *Id.* at 549. Although the district court determined that the statutes were unambiguous and that no resort to agency interpretation was necessary, *Amoco Prod. Co.*, 874 F.Supp. at 1154, it nevertheless alternatively "grant[ed] deference to the 1981 Solicitor's opinion that Congress' use of the term coal does not include CBM gas," *id.* at 1160 (relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

On appeal, defendants contend we must defer to the Solicitor's "long-standing administrative interpretation and implementation of statutes the Department of Interior administers." Federal Br. at 27; *see also* Amoco Br. at 43. Amoco argues as if *Chevron* deference were automatic, covering all kinds of agency expressions of policy and interpretation regardless of the decisionmaking process, whether prospective or retroactive, or whether concerned with public lands or private rights. The Tribe counters that the instant case is an adjudication of private

property rights and that the Solicitor's opinion is not entitled to *Chevron* deference because it was issued ex parte without the Tribe's involvement. We believe that the proper application of *Chevron* requires a discriminating analysis.

1. The Opinion

After it became apparent that commercial recovery of CBM was economically feasible, the Department of the Interior sought to expedite the development of CBM on federal land. Before development could begin, however, it was necessary to resolve the unsettled question of CBM ownership. In instances where the United States had reserved all minerals (including coal, oil and gas), the government clearly owned the CBM. Where the United States held only a partial mineral estate, proposed development of CBM on federal land required clarifying whether ownership of CBM vested in the United States through its reservation of coal under the 1909 and 1910 Acts or through its reservation of oil and gas under the 1914 Act. As a subsidiary matter, it was also necessary to determine whether the right to extract *federal* CBM should be granted via an oil and gas lease or through a coal lease.

In 1981, the Solicitor of the Department of the Interior wrote a letter to the Secretary of the Interior offering a legal opinion on these questions; the letter was subsequently promulgated without notice and comment as a Solicitor's Opinion. 88 Interior Dec. at 539. To resolve the question of CBM ownership, the Solicitor construed the meaning of "coal" in the 1909 and 1910 Acts. *Id.* at 541-545.[18] Although he acknowledged the general

[18] To determine whether federal rights to CBM resulted from federal ownership of coal or from federal ownership of oil and gas, the Solicitor began by noting the current interest in developing this resource in light of the recently achieved technical feasibility. He then examined the physical characteristics of coal and CBM.

canon that land grants are construed in favor of the sovereign and the fact that CBM had only recently become commercially severable from coal, the Solicitor nevertheless concluded that "a reservation of 'coal' [under the 1909 and 1910 Acts] does not include coalbed gas." *Id.* at 549. Accordingly, he determined that CBM interests were vested in the federal government through its oil and gas reservations. *Id.*

In making this determination, the Solicitor did not address the impact of his decision on the interests of private parties who had acquired ownership of coal, oil or gas by federal land patent prior to the issuance of the 1981 opinion, nor was any notice of the pending decision given to such owners.[19] If this opinion were accorded

Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Interior Dec. 538, 540 (1981). Next he reviewed the history of coal land withdrawals and coal reservations. *Id.* at 540-41. He observed that in 1909 and 1910 coalbed gas was both a nuisance and a hazard. *Id.* at 541. He relied on the colloquy between Congressman Mondell and Stephens to indicate the limited nature of the coal reservation, and concluded that the statutory language of the coal lands Acts and the legislative history "belie the argument" that Congress intended to reserve any mineral other than coal. *Id.* at 542. The Solicitor used subsequent legislation (the 1955 and 1933 Acts) and a case considering a common law deed to support his conclusion. *Id.* at 542-44.

[19] We note that after the issuance of the 1981 Solicitor's opinion at issue in this case, the Department of the Interior promulgated an opinion regarding the rights to CBM on the Jicarilla Apache Reservation. *Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation*, 98 Interior Dec. 59 (1990). Although the 1990 opinion relies on the 1981 Solicitor's opinion for its statutory interpretation, and thus has little to offer in terms of guidance on the 1909 and 1910 Acts, it does represent the first time Interior attempted to apply the reasoning of the 1981 Solicitor's opinion to Indian land. Some important differences exist between the Jicarilla opinion and this case. The Jicarilla Apache Tribe owns all relevant mineral resources on its reservation (coal, oil and gas). Aplt.'s App., vol. IX at 2026. Thus, the determination that an oil and gas lease is an effective instrument to lease CBM

Chevron deference, it would have a retroactive impact on private rights conveyed by the government some seventy years earlier. The question we face is whether this is the sort of decision *Chevron* is meant to enshrine.[20]

2. *Chevron* Deference

In *Chevron,* the Supreme Court considered whether an agency construction of a statutory term promulgated as an *agency legislative rule* should be binding on courts

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gas is merely an interpretation of a federal lease form, not a final determination of Tribal property rights. We accept that an oil and gas lease executed by the owner of CBM, in the absence of a specific reservation of CBM, *could* be an effective instrument to convey the right to drill and produce CBM. *Shoshone Indian Tribe v. Hodel,* 903 F.2d 784, 787 (10th Cir.1990) ("The Secretary is delegated the authority to define the terms of the leases and to 'make such rules and regulations as may be necessary for the purpose of carrying the provision of [the] section into full force and effect . . . .'" (quoting The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396)).

[20] Although we address the issue of *Chevron* deference, we note that neither Amoco, the oil industry at large, nor the Department of the Interior have previously assumed the Solicitor's opinion resolved private CBM property rights, as Amoco now advocates it should. Internal Amoco memoranda indicate Amoco has been aware since 1980 that ownership of CBM was unsettled, Aplt.'s App., vol. VII at 1412 (Amoco legal opinion on CBM ownership), and has known since 1982 that the Solicitor's opinion was not a binding determination of property rights, *id.* at 1429-1441 (Amoco business risk assessment). Amoco was also in receipt of a 1985 title opinion which concluded that the determination of CBM ownership based on the Solicitor's opinion was only "tentative" because the opinion was "subject to revision and revocation." *Id.* at 1444. Commentators on the issue of CBM ownership have also noted the non-binding nature of the Solicitor's opinion. J. Hovey Kemp & Kurt M. Petersen, *Coal-Bed Gas Development in the San Juan Basin: A Primer for the Lawyer and Landman,* 1988 ROCKY MTN. ASS'N OF GEOLOGISTS 257, 262. Similarly, after the issuance of the 1981 Solicitor's opinion, in an internal letter the Bureau of Indian Affairs, a branch of the Department of the Interior, recognized that the Southern Ute Tribe had a claim to ownership of CBM. Aplt.'s App., vol. IX at 2024.

and citizens. *Chevron,* 467 U.S. at 840, 104 S.Ct. at 2780. The Court stated that to determine whether deference was due the agency's statutory construction, a court must first determine whether Congress has "directly spoken to the precise question at issue;" if so, an agency must follow the clearly expressed intent of Congress. *Id.* at 842-43, 104 S.Ct. at 2781. "The judiciary [as] the final authority on issues of statutory construction . . . must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n. 9, 104 S.Ct. at 2781 n. 9. We have already held *supra* that Congress did not define the word coal in the 1909 and 1910 Acts and that Congress did not speak directly to the ownership of CBM.[21]

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[21] We also concluded *supra* that Congress' general intent regarding the 1909 and 1910 coal reservation is clear: Congress intended a broad definition of coal which could encompass CBM. Some courts have indicated that Congressional intent sufficient to satisfy the first step of *Chevron* can be discerned using traditional methods of statutory construction. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446-448, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987); *United States v. LaBonte,* 70 F.3d 1396, 1406 (1st Cir.1995) ("When the plain meaning of a law is not readily apparent on its face, the next resort is to the traditional tools of statutory construction—reviewing legislative history and scrutinizing statutory structure and design—in an effort to shed light on Congress's intent."), *rev'd on other grounds* —— U.S. ——, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (concluding statute unambiguous); *see also* Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L.REV. 2071, 2109 (1990) (arguing that general Congressional intent garnered from the "legislative history or background of the statute, or from understandings about *likely legislative desires,*" is sufficient to foreclose reliance on a contrary agency statutory interpretation) (emphasis added). *But see Cardoza-Fonseca,* 480 U.S. at 454-55, 107 S.Ct. at 1224-25 (Scalia, J., concurring) (suggesting that Justice Stevens, the author of *Chevron,* writing for the Court in *Cardoza-Fonseca* misinterpreted *Chevron* when suggesting that traditional tools of statutory construction can be used to supplant an agency statutory interpretation if the agency has otherwise appropriately been delegated authority to make the interpretation).

When Congress has not addressed "the precise question at issue," an agency requesting *Chevron* deference to its statutory interpretation must show that it has been delegated authority to address the question. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990) (a "precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir.1987) ("[T]he first question in determining the deference appropriate to the agency's construction is whether Congress has transferred discretion [to interpret the statute] to the agency.").

a. Delegation of Authority

The Department of the Interior has been expressly delegated authority over public lands. *See* 43 U.S.C. §§ 2, 1457; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336, 83 S.Ct. 379, 382, 9 L.Ed.2d 350 (1963) (Interior "has been granted plenary authority over the administration of public lands, including mineral lands."). As part of that authority, Interior has the right to promulgate regulations and to determine "the validity of claims against the public lands." *Best*, 371 U.S. at 336, 83 S.Ct. at 382. "[S]o long as the *legal title remains in the government*," Interior clearly has the "'power, after proper notice and upon adequate hearing, to determine whether [a mining] claim is valid.'" *Id.* at 337, 83 S.Ct. at 383 (quoting *Cameron v. United States*, 252 U.S. 450, 460, 40 S.Ct. 410, 412, 64 L.Ed. 659 (1920)) (emphasis added); *Nequoia Ass'n v. Department of the Interior*, 626 F.Supp. 827 (D.Utah 1985) (Interior granted authority to determine validity of mining claims in National Parks under Mining in the Parks Act). For purposes of our analysis, we assume without deciding that Interior's power extends to the circumstances at issue here.[22]

[22] It is far from clear that the agency's authority extends to the issue presented in the case at bar. Even if the Solicitor's opinion represents a legitimate exercise of its authority over federal property, the lands in question in this case are not federal. If Interior once had jurisdiction over these lands, it no longer does. *Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 697, 34 S.Ct. 907, 918, 58 L.Ed. 1527 (1914) (After a "'patent issued, that was the end of the jurisdiction of the Department over the lands.'" (quoting Secretary of the Interior)). The jurisdiction of the Department of the Interior after the issuance of land patents has always been viewed as limited:

> The limit of its authority is found in the acts of congress. It cannot grant land. . . . It cannot take away the property of one and give it to another. . . . Its jurisdiction terminates and its authority ceases when the land passes into private ownership and the title of the government is transmitted through the forms of law.

2 CURTIS H. LINDLEY, AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 664, at 1656 (Fred B. Rothman & Co. photo. reprint 1988) (3d ed.1914). A statutory delegation of authority would be required for Interior to have the power to re-assert jurisdiction over lands after patent issuance, and no such delegation has been made. *See, e.g., Foust v. Lujan*, 942 F.2d 712, 714-15 (10th Cir. 1991) (noting specific grant of authority to Interior by the Federal Land Policy and Management Act to correct mistakes of fact after patent issuance, but no grant of authority to correct other patent problems like mistakes of law).

In a situation similar to the present case, Congress conveyed by statute the United States' interest in uranium contained in coal reserved by the 1909 and 1910 Acts. 30 U.S.C. §§ 541-541i. Clearly, Congress neither expressly nor implicitly delegated power to Interior to determine that coal-ownership question. Moreover, Congress left to local courts resolution of disputes between patent holders and private parties (like the Tribe) who are successors in interest to the 1909 or 1910 Act coal reservations. H.R. REP. No. 1478 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2992, 2996 ("[C]onflicts of interests [over the right to extract uranium and other source material from the coal] should be resolved by the parties concerned or, failing that, by the local courts and not through legislation."); *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 64[illegible], 110

b. The Format of Decisionmaking

To satisfy *Chevron*, the delegation of authority to form binding policy must include not only discretion to formulate interpretations but also discretion to utilize the par-

ticular format selected. *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) (hereinafter Anthony) ("The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used."). After analyzing relevant Supreme Court cases, commentators Davis and Pierce have concluded "*Chevron* should be held to apply to the meanings agencies give statutes in all legislative rules and in most adjudications. [But][i]t should not be held to apply to agency pronouncements in less formal formats. . . ." 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 119 (3d ed.1994).

This circuit has denied *Chevron* deference to agency policies promulgated in formats other than legislative rules or adjudications. *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir.1994) ("[W]hile [an interpretive rule] may be entitled to some consideration in our analysis, it does not carry the force of law and we are in no way bound to afford it any special deference under *Chevron*.") (citations omitted). As we have unequivocally held, "[i]t is elementary administrative law that in order for [agency actions] to have binding force

S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990) (Where Congress has "expressly established the Judiciary and not the [administrative agency] as the adjudicator of private rights of action arising under the statute," the "precondition to deference under *Chevron* [of] a congressional delegation of administrative authority" is not met.).

Thus, although the Department of Interior clearly has authority to administer public lands, Interior has not demonstrated that it has been delegated authority to decide which lands are public, or to bind private parties after issuance of federal patents to its statutory interpretation. Because for other reasons we are not required to give *Chevron* deference to the Solicitor's opinion, we need not decide whether we would otherwise decline to defer to the Solicitor's opinion on the ground that Interior was not delegated authority over the kind of dispute we have here.

there are only two methods that an agency may use in formulating policy. It may establish binding policy either through rule-making procedures or through adjudications that create binding precedents." *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir.1985).[23]

Most circuits agree with our conclusion that *Chevron* deference is owed only to legislative rules and agency adjudications. *See, e.g., Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 534-35 (2d Cir.1994) (denying *Chevron* deference to statutory interpretation promulgated in agency advisory circular after concluding that the advisory circular was not a "regulation" for the purposes of the Act at issue); *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 841-42 (6th Cir.1994) (distinguishing *Chevron* deference granted to agency legislative rules from lesser deference accorded policy statements and interpretive rulings); *Satellite Broad. & Communications Ass'n of America v. Oman*, 17 F.3d 344, 346-47 (11th Cir.1994) (according *Chevron* deference to formally promulgated legislative rule after previously declining to accord deference

[23] It is sometimes difficult to distinguish legislative rules from policy statements. Davis and Pierce have described the differences in this way:

> There are three main differences between a legislative rule and a general statement of policy. First, except in specified circumstances, an agency cannot promulgate a legislative rule without first following notice and comment procedures; by contrast, APA § 553(b) specifically exempts general statements of policy from notice and comment procedures. Second, a valid legislative rule has the same binding effect as a statute; a general statement of policy has no binding effect on members of the public or on courts. A general statement of policy also is not judicially enforceable against an agency. . . . Third, many legislative rules are subject to potential judicial review before they are applied in a particular case; most general statements of policy are not subject to judicial review in the abstract.

1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.2, at 228 (3d ed.1994) (internal citation omitted).

to similar policy decision); *Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed.Cir.1992) (noting general rule that agency pronouncements in formats less formal than legislative rules should be analyzed under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944), rather than *Chevron*); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 & n. 39 (5th Cir. 1990) (acknowledging application of *Skidmore* analysis to agency interpretive rules); *cf. Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n*, 869 F.2d 719, 736 (3d Cir.1989) (an agency policy statement "is entitled to no greater deference than any other policy statement, i.e., none") (citations omitted); *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C.Cir.1988) ("A binding policy is an oxymoron."). *See generally Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir.1994) (en banc) (*Chevron* deference owed where agency has rulemaking authority and follows notice and comment process but not where agency has no rulemaking authority), *aff'd on other grounds*, —— U.S. ——, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996) (holding text and structure of statute clear).[24]

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[24] Such confusion as exists within or between the circuits regarding *Chevron* deference is due informally promulgated agency statements can be attributed to the Supreme Court's loose invocation of *Chevron* terminology. *See generally* 1 DAVIS & PIERCE, § 3.6. Thus, the Court has sometimes cited *Chevron* in cases where *Chevron* deference was not actually granted. For example, in *Reno v. Koray*, 515 U.S. 50, 58-62, 115 S.Ct. 2021, 2026-27, 132 L.Ed.2d 46 (1995), the Court, citing both the *Chevron* and the *Skidmore* line of cases, see *infra* part II D 3, gave "some" deference to the Bureau of Prisons' statutory interpretation promulgated in an internal agency guideline. The Third Circuit subsequently used the Supreme Court's citation to justify granting *Chevron* deference to informally promulgated agency statutory interpretation. *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir.1995) (citing *Koray*, 515 U.S. at 58-59, 115 S.Ct. at 2026-27). But as Judge Nygaard pointed out in dissent, the Court in *Koray* only agreed with the agency interpretation because it was the most natural reading of the statute in question, not because *Chevron* mandated that it defer to an informally promulgated agency interpretation. *Id.* at 193-94 (Nygaard, J. dissenting).

According to the Department of the Interior's internal regulations, the Solicitor has authority:

> To issue final legal interpretations, in the form of M-Opinions published in *Decisions of the United States Department of the Interior*, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Under Secretary, or the Secretary.

Aplt.'s App., vol. IX at 2069. A Solicitor's opinion is issued at the personal discretion of the Solicitor, without notice and comment, and can be overruled or modified at any time. *Id.* at 1982, 2069. The opinion at issue here, although presented as authoritative statutory construction, is nothing more than a public pronouncement that Interior will not assert the federal government's right to CBM under its reservation of coal; in that context, the opinion is a valid and useful document. As a simple policy statement, however, the Solicitor's opinion fails to provide the procedural protections required for *Chevron* deference to attach.

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound*

> *by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them.*

Anthony, *supra,* at 57-58 (footnotes omitted and emphasis added).

Agencies can make law only in two formats, legislative rules and adjudications; the Solicitor's opinion was not promulgated with the procedural protections attendant to either format. *Amrep,* 768 F.2d at 1178. Accordingly, *Chevron* does not mandate that we give deference to the 1981 Solicitor's opinion.[25]

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[25] Defendants contend we must give *Chevron* deference to *this* Solicitor's opinion because we have given deference to *other* such opinions in the past. Cases in which we granted some deference, however, are readily distinguishable from this one. In *Aulston v. United States,* for example, we decided that a 1914 reservation of "gas" to the United States included carbon dioxide. *Aulston v. United States,* 915 F.2d 584, 585 (10th Cir.1990). The dispute arose between the United States, as holder of the gas estate, and the agricultural patentee. *Id.* The United States had granted an oil and gas lease, which it said included the right to explore for carbon dioxide gas. *Id.* at 587. The case came before this court as an appeal from an Interior Board of Land Appeals (IBLA) decision. *Id.* at 588. After conducting our own analysis of the 1914 statutes, we determined that a Department of the Interior interpretation of "gas" in the Mineral Lands Leasing Act (MLLA), a related statute, was due "some consideration" by the court, and that "some deference" to Interior's interpretation of the 1914 Act was appropriate in review of the IBLA decision. *Id.* at 596. In so holding, we rejected less formal Department of the Interior internal memoranda promulgated without the procedural protections of formal rulemaking or adjudications. *Id.* at 595 & n. 16. Even allowing that some deference was due the IBLA decision, we nonetheless were not persuaded that the decision was dispositive of the issue. We also relied on "[o]ther factors" to ensure that the interpretation of gas forwarded by the Department of the Interior was consistent with the purpose of the 1914 Act. *Id.* at 599. *Aulston* is thus a case which rejected informally promulgated statutory interpretations, involved federal rather than private land interests, and reached this

3. *Skidmore* Consideration

Although *Chevron* deference to the Solicitor's opinion is clearly not warranted, we do assess the merits of that opinion to the extent suggested in *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

> We consider that the rulings, interpretations and opinions of the [agency], . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a par-

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court from an agency IBLA adjudication in which due process was afforded the participants.

In *Rocky Mountain Oil & Gas Ass'n v. Watt,* 696 F.2d 734, 737 (10th Cir.1982), a pre-*Chevron* case, we were concerned with a trade association's challenge to the Department of the Interior's interpretation of the Federal Land Policy and Management Act of 1976, issued initially in a Solicitor's opinion, as the Act related to oil and gas activity on federal lands under lease. Subsequently, the relevant parts of the Solicitor's opinion were formally promulgated in a Wilderness Inventory Handbook and in Interim Management Policy and Guidelines, both after notice and comment procedures. *Id.* at 739 n. 6. Moreover, unlike the case at bar, the United States was the owner of the mineral resource and the issue was only the regulation of that resource. In such circumstances, Interior unquestionably has the authority to regulate in such a manner and we would naturally defer to its reasonable interpretation. *See also Exxon v. Lujan,* 970 F.2d 757 (10th Cir.1992) (granting *Chevron* deference to Interior decision to issue permit for transport of carbon dioxide gas under the Mineral Leasing Act rather than under FLPMA in an appeal from an IBLA decision where due process was afforded participants and Interior unquestionably administers both statutes); *Brennan v. Udall,* 379 F.2d 803 (10th Cir. 1967) (recognizing mandatory deference to reasonable Department of the Interior conclusion that oil shale was included in reservation of oil to the United States, where the United States owned the reserved mineral interests, where the successor in interest to the agricultural patentee voluntarily submitted the dispute to Interior adjudication, where Interior's position on oil shale had been a matter of public record for fifty years, and where reservation of oil shale could have been contested prior to patent issuance).

> ticular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140, 65 S.Ct. at 164; *see also Headrick*, 24 F.3d at 1282 (distinguishing between *Chevron* and *Skidmore* deference). There are several facets of this Solicitor's opinion, however, that impair its "power to persuade."

The Solicitor began his analysis of CBM ownership by noting the principle of resolving doubts in land grants in favor of the sovereign. While properly citing *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617, 98 S.Ct. 2002, 2009-10, 56 L.Ed.2d 570 (1978), for this general principle on land grants, the Solicitor immediately qualified the application of that principle by asserting that land grants " 'are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . .' " *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83, 99 S.Ct. 1403, 1411, 59 L.Ed.2d 677 (1979) (quoting *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 14, 14 S.Ct. 11, 15, 37 L.Ed. 975 (1893)). Apart from the basic premise that the principle of favoring the sovereign is involved when the legislative intent is in doubt, as here, the quoted qualification to the general rule arose in the context of grants under the Railroad Acts where the United States had offered land to railroads as an inducement to undertake track construction. *Id.* Since the situation involved here is not analogous to the facts of *Leo Sheep*, the principle of resolving doubts in favor of the sovereign applies with undiminished vigor. The Solicitor's conclusion on CBM ownership was determined without application of this governing canon.

The Solicitor further compromised his legal analysis by citing a state law case and suggesting that principles

of common law conveyances lend support to his conclusion regarding ownership of CBM. 88 Interior Dec. at 544. Not only was the particular case on which the Solicitor relied overruled on appeal, *United States Steel Corp. v. Hoge*, No. 78-682 (Pa. Ct. C.P., Greene Cty., March 24, 1980), *aff'd*, 304 Pa.Super. 182, 450 A.2d 162 (1982), *rev'd*, 503 Pa. 140, 468 A.2d 1380 (1983), but cases construing common law conveyances are inapposite to the case at bar as we have discussed *supra* note 17.

The Solicitor's position on the statutory reservation of CBM is also inconsistent with Interior statements on coal made contemporaneously with the 1909 and 1910 Acts. In 1909 the United States Geological Survey, a branch of the Department of the Interior, recognized that gas trapped with coal is generated by the coalification process. Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust*, U.S. Geol. Surv. Bull. 383, H.R. Doc. No. 59-823, at 16 (1909). This contemporaneous statement acknowledging the shared genesis of coal and CBM belies the Solicitor's simplistic conclusion that in 1909 Congress believed that coal was a "solid rock." The Solicitor's narrow construction of coal in the 1909 and 1910 Acts is also inconsistent with the position Interior has taken in other similar mineral reservation disputes. As we have noted *supra*, Interior has typically construed such mineral reservations broadly. *See Aulston*, 915 F.2d at 595; *Brennan v. Udall*, 379 F.2d at 804; *see also* 1 CURTIS H. LINDLEY, AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 96, at 169 ("the word 'mineral,' as used in these various acts, should be understood in its widest signification"). On the few occasions in which a mineral term has been interpreted narrowly, courts have rejected those interpretations. *See, e.g., Western Nuclear, Inc.*, 462 U.S. at 42, 45, 103 S.Ct. at 2222-23, 2224 (rejecting Circuit Court's reliance on 1910 Department of the Interior determination that gravel is

not a mineral in favor of more recent expansive definitions of the term); *Union Oil Co.*, 549 F.2d at 1279-80 & n. 19 (rejecting Department of the Interior letter opinions suggesting that geothermal steam is not a mineral within the meaning of the Stock-Raising Homestead Act).

Moreover, the opinion has a number of factual limitations that militate against applying it here. The opinion is titled "*Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits.*" 88 Interior Dec. 538 (1981). It thus only purports to govern the disposition of present federal land interests, not the interests of private parties, such as are at issue in this case. The opinion also explicitly refuses to "warrant title to any oil and gas deposit." *Id.* at 549. The Solicitor thereby concedes that it is beyond the scope of the opinion to settle disputed property rights. It is only now, over a decade after the issuance of the opinion, that the Amoco defendants and the Department of the Interior suggest that private parties like the Tribe should be swept within the opinion's net and that their ownership of CBM was finally settled by its rationale. These assertions reach well beyond the scope of the original opinion.

Finally, we are convinced that the Solicitor's statutory interpretation of the 1909 and 1910 Acts is arbitrary. Even under the deference mandated by *Chevron*, "legislative regulations are [not] given controlling weight [if] they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844, 104 S.Ct. at 2782. "Review under the 'arbitrary and capricious' tag line . . . encompasses a range of levels of deference to the agency." *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C.Cir.1987). "In . . . typical reviews, . . . we must consider whether the agency's decisionmaking was 'reasoned.'" *Id.* at 5 (citation omitted). An agency decision which is not reasoned persuades no more than it controls. Reasoned decisionmaking considers "relevant factors" and explains the "'facts and policy concerns.'" *Id.* (citation

omitted). While the Solicitor recognized that CBM is always present in solid rock coal and is only "potentially" but not naturally severable from coal, he nonetheless concluded that a reservation of coal excludes CBM. 88 Interior Dec. at 540. By failing to explain how Congress could have intended to convey a substance neither known to be valuable nor severable at the time of the enactments, the Solicitor's opinion failed to consider facts which might have significantly affected its decisionmaking. Reasoned decisionmaking does not omit without explanation potentially determinative factors.

Thus, we are not persuaded we should defer to the Solicitor's opinion.[26] The general congressional intent of the 1909 and 1910 Acts to reserve to the United States all the benefits of the coal resources controls the determination of CBM ownership. We hold that ownership of CBM, an integral component of coal inseverable at the time of the 1909 and 1910 enactments, is vested in the Tribe as owners of the coal resource.

III.

The district court concluded that the class action defenses to the Tribe's assertion of CBM ownership were mooted by its determination of CBM ownership in the Amoco defendants. *Amoco Prod. Co.*, 874 F.Supp. at 1161. Consequently, the court did not address the issues raised by the common defenses. *Id.* Because we reverse the district court on the threshold issue of CBM ownership, further proceedings will be required for resolution of these issues.

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[26] Although we hold that no deference is due the Solicitor's opinion as it relates to the determination of private CBM ownership, we do not address the degree of deference due the opinion as applied to ownership of federal land interests, to regulation and use of mineral assets on federal lands, or to interpretation of federal lease forms.

As we mentioned at the outset, the federal defendants joined with the Amoco defendants on the issue of CBM ownership. They also asserted that the statute of limitations contained in 28 U.S.C. § 2401(a) precludes the Tribe's claim of breach of fiduciary duty against them. Because the district court granted the federal defendants' motion for summary judgment on breach of fiduciary duty to manage the CBM based on its finding CBM ownership in the Amoco defendants, it never reached the statute-of-limitations issue as applied to the federal defendants. *Amoco Prod. Co.*, 874 F.Supp. at 1161. Further proceedings will also be required on this issue on remand.[27]

IV.

For all the foregoing reasons, we hold that the Southern Ute Indian Tribe, as successor in interest to coal reserved to the United States by the Acts of 1909 and 1910, is the owner of coal bed methane contained in that coal. Accordingly, we REVERSE the district court's grant of summary judgment in favor of defendants and remand for further proceedings consistent with this opinion.

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[27] To the extent the federal defendants' statute of limitations argument relies on the 1981 Solicitor's opinion to provide notice to the Tribe and to initiate the accrual of time, we note that such notice may be legally insufficient in light of our holding that the Solicitor's opinion is not binding on the issue of Tribal CBM ownership. *Limerick Ecology*, 869 F.2d at 735 (parties have no obligation to challenge an opinion which is non-binding); *Utah v. United States*, 624 F.Supp. 622, 625-26 (D.Utah 1983) (limitations period did not expire on State of Utah's claim against the United States where only notice to Utah was non-binding Department of the Interior Regional Solicitor's opinion that conflicted with Secretary of the Interior's letter opinion), *aff'd*, 780 F.2d 1515 (10th Cir. 1985), *rev'd on other grounds sub nom. Utah Div. of State Lands v. United States*, 482 U.S. 193, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987). We leave that determination to the district court as well.

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JUDGE LEWIS T. BABCOCK

Civil Action No. 91-B-2273

SOUTHERN UTE INDIAN TRIBE,
Plaintiff,

v.

AMOCO PRODUCTION COMPANY; SHIRLEY K. ADAMS; HENRY ASHWORTH; CARLA M. ASPAAS; ERIC K. ASPAAS; HELEN RUTH ASPAAS; LAURA BELLE ASPAAS; LETA M. ADKINS; RITA M. ADKINS; MAXWELL C. ANDERSON; EARL A. BARKER; HEIRS OF MAURICE C. BREEN, DECEASED; HORACE F. BUCHANAN; THE HEIRS OF HORACE BUCHANAN, DECEASED; GEORGE A. BUGG; CARBONE INVESTMENT COMPANY; JACK CARMACK; ROWLAND CARMACK; JOSEPH C. CIANCIO; WILLIAM KEMP CLARK; COLORADO NATIONAL BANK OF DENVER AS TRUSTEE OF THE GEORGE VETO TRUST; THE COLORADO NATIONAL BANK OF LONGMONT AS CONSERVATOR OF THE ESTATE OF GLADYS N. FRAZZINI, DECEASED; DOROTHY A. CORGIN; THE HEIRS OF KELLY COX, DECEASED; A.B. CROSBY; BARBARA CROSBY; DAVID CROSBY; JOHN CROW, JR.; MARGARET CROW; MANUEL CRUZ; LOUIS M. CUMMINS; FREDERICK E. DICKERSON; J. M. EAKES; ROBERT MCFERRAN EAKES; MARGARET ELLISON; SALLY M. ETTERBECK; MINNIE FLAKS; TILLIE FLAKS; CASSIO FRAZZINI; ADELE FROST; ROBERT GALBASIN; ABEL S. GALLEGOS; MONTEY GARNAND; RUBY GIBBS GOGGANS; CHRISTINE HAMILTON; HARDIN SIMMONS UNIVERSITY; THE HEIRS OF H. A. HARMON, DECEASED; KATHERINE FRANCES MCELVAIN HARVEY; THE SHAREHOLDERS OF HONDO

OIL & GAS CORPORATION; CHARLES KETTERING; FIDEL LUCERO; RICHARD C. MALCOMB; SUZANNE HEATH MANGES; KATHERINE B. MCELVAIN; MABEL MCELVAIN; THORNTON H. MCELVAIN, JR.; DOROTHY N. MCKELVEY; EDWIN L. MCKELVEY; R. FRANKLIN MCKELVEY; W.R. MCMAHON MCMURRY OIL COMPANY; W. CLAY MEREDITH CHARITABLE TRUST; THE HEIRS OF W.A. MONCRIEF, DECEASED; ROY E. MONTGOMERY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF W. CLAY MEREDITH, DECEASED; THE HEIRS OF FORREST D. MILLER, DECEASED; THE HEIRS OF HELEN L. MILLER, DECEASED; THOMAS S. MORRISSEY; THOMAS J. MORRISSEY; EMIL MOSBACHER; EMIL MOSBACHER, III; JOHN DAVID MOSBACHER; R. BRUCE MOSBACHER; MYRA THERESA MOULDS; NORTH CENTRAL OIL CORPORATION; H.L. OLIVER; CLARA ONOFRIO; MARGARET C. PARGIN; HAROLD F. PAYNE, JR.; NEVILLE G. PENROSE; BEN M. PETERSON, JR.; FREDERICK PETROCCO; PHILLIPS PETROLEUM COMPANY; JAMES M. RAYMOND; THE HEIRS OF W.E. RENNIE, DECEASED; THOMAS C. ROMOLO; BENTON E. SMULLYEN; CLINTON I. SMULLYEN; WILLIAM STIRLING; THE HEIRS OF J.L. TATUM, DECEASED; ANNA CARLEO TOMEO; ERNEST TOMEO; TURNER SECURITIES; RICHARD W. TURNER, SR.; THE HEIRS OF GEORGE C. VANCE, DECEASED; ANTHONY H. VETO; JOSEPH F. WARE, JR.; ALBERT E. ZARLENGO; ANTHONY F. ZARLENGO; JOHN DOE AND ALL OTHER UNKNOWN PERSONS CLAIMING AN INTEREST IN THE MINERAL ESTATE LOCATED WITHIN THE N/2 OF SECTION 12, T33N, R8W, N.M.P.M., LA PLATA COUNTY, COLORADO; AMAX OIL & GAS, INC.; BOWEN/EDWARDS ASSOCIATES, INC.; CONOCO, INC.; FUEL RESOURCES DEVELOPMENT COMPANY; J.M. HUBER CORPORATION, OIL AND GAS DIVISION; MARKWEST ENERGY PARTNERS LIMITED; MCKENZIE METHANE CORPORATION; MERIDIAN OIL, INC.; MOBIL OIL CORPORATION; NATIONAL COOPERATIVE REFINERY ASSOCIATION; NORTHWEST

PIPELINE CORPORATION; PABLO OPERATING COMPANY; PALO PETROLEUM, INC.; PALO/EAGLE JOINT VENTURES; RICHMOND PETROLEUM, INC.; TIFFANY GAS COMPANY; WILLIAMS PRODUCTION COMPANY; UNION TEXAS PETROLEUM CORPORATION; JOHN DOE OIL COMPANY AND ALL OTHER UNKNOWN PERSONS OR ENTITIES CLAIMING LEASEHOLD WORKING INTERESTS OR OPERATING RIGHTS TO EXPLORE FOR, PRODUCE OR DEVELOP COALBED METHANE OR COAL CONSTITUENTS FROM COAL OR COAL STRATA RESERVED BY THE UNITED STATES IN PATENTS ISSUED UNDER THE ACT OF MARCH 3, 1909, OR THE ACT OF JUNE 22, 1910, FOR LANDS LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION, AND WHICH ENTITIES HAVE NOT OBTAINED TRIBAL CONSENT TO AND FEDERAL APPROVAL OF SAID EXPLORATION, PRODUCTION OR DEVELOPMENT ACTIVITIES; MANUEL LUJAN, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; THE UNITED STATES DEPARTMENT OF THE INTERIOR AND ITS SUBORDINATE AGENCIES; THE BUREAU OF INDIAN AFFAIRS; THE BUREAU OF LAND MANAGEMENT; THE MINERALS MANAGEMENT SERVICE; EDDIE F. BROWN, ASSISTANT SECRETARY OF THE BUREAU OF INDIAN AFFAIRS; DELOS CY JAMISON, DIRECTOR OF THE BUREAU OF LAND MANAGEMENT; SCOTT S. SEWELL, DIRECTOR OF THE MINERALS MANAGEMENT SERVICE; CLASS OF DEFENDANTS SITUATED SIMILARLY TO THOSE NAMED NON-GOVERNMENTAL DEFENDANTS WHO CLAIM OWNERSHIP OF AN INTEREST IN COALBED METHANE AND OTHER COAL CONSTITUENTS OR CLAIM THE RIGHT TO EXPLORE FOR, DEVELOP OR PRODUCE THOSE SUBSTANCES FROM COAL OR COAL STRATA RESERVED BY THE UNITED STATES IN PATENTS ISSUED UNDER THE ACT OF MARCH 3, 1909, OR THE ACT OF JUNE 22, 1910, FOR LANDS LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION AND WHICH CLASS MEMBERS HAVE NOT OB-

TAINED TRIBAL CONSENT TO AND FEDERAL APPROVAL OF SAID INTERESTS OR RIGHTS.

Defendants.

AMENDED MEMORANDUM OPINION AND ORDER

Babcock, J.

The central issue in this case is whether in the Coal Lands Acts of 1909 and 1910 Congress reserved coalbed methane gas (CBM gas) in the United States when, under those acts, it reserved coal. I hold that Congress did not reserve CBM gas in the United States in the Coal Lands Acts of 1909 and 1910 and, consequently, Plaintiff, the Southern Ute Indian Tribe's (the Tribe) claim of equitable ownership to CBM gas in the lands at issue fails. Although this key question and its answer are simply stated, their basis necessarily requires considerable discussion.

The Tribe sued Amoco Production Company (Amoco), other oil companies, and individuals who claim various ownership interests to CBM gas contained in coal strata which previously had been reserved in the federal government under the Coal Lands Acts of 1909 and 1910, seeking declaration of ownership in the CBM gas, injunctive relief and damages based upon various theories including trespass and conversion. The Tribe also sued various federal governmental entities (federal defendants) claiming breach of fiduciary duty to manage the Tribe's trust resources. The federal defendants are Manuel Lujan, Jr., Secretary of the United States Department of the Interior, the Department of the Interior and its subordinate agencies, the Bureau of Indian Affairs, the Bureau of Land Management, the Minerals Management Service, Eddie F. Brown, Assistant Secretary of the Bureau of Indian Affairs, Delos Cy Jamison, Director of the Bureau of Land Management, and Scott S. Sewell, Director of the Minerals Management Service.

I certified a defendant class pursuant to Fed.R.Civ.P. 23(b)(2) to determine two issues (1) ownership of the CBM gas and (2) the existence and applicability to the ownership question of several defenses "common" to the non-federal defendant class comprised of all defendants except the federal defendants. Amoco was named as the defendant class representative. *See* Case Management Order No. 1. The federal defendants argue the Tribe's claim against them is barred by the applicable statute of limitations.

These issues are framed by cross-motions for summary judgment and the federal defendants' alternative motion to dismiss. The motions have been exhaustively briefed and argued. In view of my holding on the central question, I conclude that summary judgment should be awarded in favor of the defendant class and against the Tribe on the issue of CBM gas ownership. I further conclude that the federal defendants' motion for summary judgment should be granted on the issue of breach of fiduciary duty for the alleged failure to manage CBM gas as a tribal resource. Still remaining for future resolution are the Tribe's claims not dependent upon the ownership issue.

Jurisdiction is proper under 28 U.S.C. §§ 1331, 1361, and 1362. Under § 1362 the district court has original jurisdiction of the case brought by the Tribe against each of the defendants except the United States. Under 28 U.S.C. § 1505, the Court of Claims has jurisdiction to hear the Tribe's claim against the United States but this jurisdiction is not exclusive. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1238, 1242-43 (N.D.Cal. 1973).

I.

Summary Judgment Standard

Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to inter-

rogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.*, 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e).

Burden of Proof

Fed.R.Civ.P. 56 ordinarily allocates the burden of proof in motions for summary judgment. But in matters relating to property rights of Indians, the burden of proof to be employed is defined in 25 U.S.C. § 194:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

If the requirements of 25 U.S.C. § 194 are met, the burden of proof is placed on the non-Indian party, in this case the non-federal defendant class. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979). Although the parties have expended considerable energy arguing the

applicability of § 194 to the ownership question, as will be seen, the ownership question turns as a matter of law on pure statutory construction.

II.

Background and History

The Tribe claims ownership of CBM gas found in the coal strata located on the Southern Ute Indian Reservation in southwestern Colorado. Approximately 200,000 acres within the exterior boundaries of the Tribe's reservation are held in fee by private persons and contain CBM gas now valued conservatively at $200,000,000. Presently, many non-Indian fee holders are receiving ownership benefits connected with the CBM gas in the form of revenues either from the sale of CBM gas or from oil and gas leases held by oil companies. An historical backdrop is necessary to understand the results obtained here.

In the second half of the 19th century, several tribes of Indians individually known as the Uncompahgre Utes, the White River Utes, and the Southern Utes, came to be known collectively by the United States as the Confederated Bands of Utes. At the urging of the United States, the Confederated Bands of Utes exchanged their aboriginal lands in New Mexico, Utah, and Colorado for a reservation of more than 15 million acres located entirely in *Colorado. United States v. Southern Ute Tribe*, 402 U.S. 159, 161-62 (1971); 15 Stat 619 (1868); 13 Stat 673 (1864). In 1874, after learning of valuable mineral deposits on the reservation, the United States urged, and the Confederated Bands of Utes approved, the Brunot Cession to the United States of 3.7 million acres located in the middle of the reservation. *Southern Ute*, 402 U.S. at 162; 18 Stat 36 (1874). As a result, the reservation boundaries changed and the Southern Utes came to occupy a strip of land approximately 15 miles wide and 110 miles long (referred to as Royce Area 617) at the southernmost portion of the reservation.

By 1880, the Southern Utes were alone on the reservation, the Northern Utes having relocated to Utah. Public outcry over the "Meeker Massacre" in which twelve non-Indians were killed led to the Act of 1880, ch. 223, 21 Stat. 199 (1880 Act), the central goal of which was the "termination of tribal ownership in the reservation lands . . . ." *Southern Ute*, 402 U.S. at 163. The 1880 Act provided that the Confederated Bands "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." 21 Stat. 200 (1880). The provisions for settlement resulted in the removal of the Northern Utes to Utah and the settlement of the Southern Utes to unoccupied agricultural lands on the La Plata River in Colorado. In keeping with the express congressional purpose to destroy tribal structure, *see* 10 Cong. Rec. 2059, 2066 (1880), the Act also limited Indian land ownership to a specific amount of land allotted in severalty to individual Indians. The Act also provided that "all the lands not so allotted, the title to which is . . . released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal," for the financial benefit of the Utes. *Southern Ute*, 402 U.S. at 163-63.

The Supreme Court has left no doubt as to the meaning and effect of the 1880 Act. "The central feature of the Act of 1880 was the *termination of tribal ownership* in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians." *Southern Ute*, 402 U.S. at 163. (emphasis added). All lands not allotted in severalty to individual Indians, then, including the lands in question here, were conveyed by the Utes, *Id.* at 169, to become public lands of the United States. 21 Stat. 203 (1880).

Over the next several decades, the ceded, non-allotted lands (surplus lands) that had previously made up the reservation were open to public entry and settlement

under the public land laws. 28 Stat. 677-78 (1895). These laws included the Homestead Act of 1862, 43 U.S.C. § 161 et seq. (repealed 1976), the Coal Lands Act of 1873, 17 Stat. 607, and the Mining Law of 1872, 30 U.S.C.A. § 22. Under these laws, entrymen could, upon satisfaction of certain patent requirements depending on how the land was classified, obtain a fee simple absolute title to the land. Specifically, homesteaders could enter agricultural lands and obtain fee simple absolute title to 160 acres without payment, *see e.g.* 3 Stat. 566 (1820), coal miners could enter coal lands and obtain fee simple absolute title to 160 acres upon payment of not less than either $10 or $20 per acre depending upon the distance of the land from the nearest railroad, 17 Stat. 607 (1873), and oil and gas explorers could enter mineral lands, locate and perfect gas placer claims, and obtain fee simple absolute title upon payment of $2.50 per acre. 30 U.S.C. § 29, 30, 37 (1988).

In practice however, the application of the various public land laws left much to be desired, in large part because the Department of the Interior did not investigate and classify lands before allowing entry. Rather, the Department relied on entrymen to classify their own parcels of land as chiefly valuable for agriculture, coal, or minerals. Consequently, patents to millions of acres of land were issued based largely on statements of entrymen as to the nonmineral character of the land. *See e.g. Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 48, n.9 (1983); U.S. Geological Survey, *The Classification of the Public Lands*, pp. 12-13, 32-33 (1913).

The resulting misclassification of lands occurred mainly for two reasons. First, entrymen made good faith mistakes in classifying their lands because it was often difficult to determine whether the land was more valuable for the minerals it contained or for the more obvious agricultural purpose. *See Deffeback v. Hawke*, 115 U.S. 392, 405 (1885). *See also Watt v. Western Nuclear, Inc.*, 462

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U.S. at 48, n.9. Second, in recognition of cc as the nation's chief energy resource, the price an entryman had to pay to obtain title to coal lands substantially exceeded that for other types of lands. In addition, a greater amount of land was needed to support a coal mining operation than could be obtained lawfully under the Coal Lands Act of 1873. Thus, incentives existed for entrymen to cheat by misclassifying lands valuable for coal. As a result, patents were issued to millions of acres of western coal lands which had been misclassified as non-coal lands.

The tide of events during the first decade of the 20th century focused national attention on coal lands and precipitated great debate over management of the country's primary energy resource. First, coal was the chief energy resource fueling the nation's shift from an agrarian economy to an industrial economy. The coal supply had been plentiful but during this period, a coal shortage struck the west. *See* 40 Cong. Rec. 8448 (1906); *Coal Lands and Coal-Lands Laws of the United States*, 59th Cong., 1st Sess., 38 (Jan. 9, 1907); *Coal Lands and Coal-Lands Laws of the United States*, 59th Cong., 1st Sess., 27 (Jan. 14, 1907); *See* C. Mayer & G. Riley, *Public Domain, Private Domain—A History of Public Mineral Policy in America*, 114-130 (1985). Next, it became clear that coal lands were being obtained by fraud. *See e.g.*, 41 Cong. Rec. 450 (1906); *Coal Lands and Coal-Lands Laws of the United States*, 59th Cong., 1st Sess., 6 (Dec. 17, 1906) (1/2 to 2/3 of coal lands entered by unlawful means); *Mayer & Riley*, at 117 (although 6 million acres of coal lands were transferred into private ownership between 1873 and 1906, only an estimated 400,000 acres were sold under authority of Coal Lands Act of 1873). Finally, the railroad monopolies had fraudulently acquired vast amounts of coal lands and engaged in price-fixing to maintain their near "absolute control over all production and transportation and marketing of coal." *See e.g., Coal Lands and Coal-Lands Laws of the United*

States, 59th Cong., 1st Sess., 7 (Dec. 17, 1906); *Mayer & Riley*, at 119-123; *Report of Investigation by Interstate Commerce Commission into Railroad Discriminations and Monopolies in Coal*, S. Doc. No. 450, 60th Cong., 1st Sess., 2 (1908); Dec. 17, 1906 Hearing, pp. 1-18; H.R. Rep. 7643, 59th Cong., 2d Sess., 6 (1907).

Concerned about the impact of extensive land fraud on the need to develop and dispose of coal "under conditions which would inure to the benefit of the public as a whole," 41 Cong. Rec. 2615, 2806-08 (1907), President Theodore Roosevelt ordered the Department of Interior to withdraw from entry, lands that contained "workable coal" and to suspend issuance of patents on the lands withdrawn. 41 Cong. Rec. 2614-15 (1907). This order affected more than 65 million acres of land located in several western states including Colorado. *See e.g.* P. Gates, *History of Public Land Law Development*, 726 (1968); T. Larson, *History of Wyoming* 379 (1965). Approximately 1.47 million acres of the withdrawn lands were located near Durango, Colorado, *see Coal Lands and Coal-Lands Laws of the United States*, 59th Cong., 1st Sess., 15 (Dec. 18, 1906) including the acreage involved in this case.

President Roosevelt expressly stated that the reason for ordering the withdrawal included "the extremely unsatisfactory condition of the public land laws and . . . the prevalence of fraud . . . ." *See* 41 Cong. Rec. 450 (1906). He advised Congress that he had "temporarily withdrawn from settlement" lands containing workable coal until the "question . . . can be settled by legislation." *See Message of the President of the United States Communicated to the Two Houses of Congress at the Beginning of the Second Session of the 59th Congress*, p. 17 (Dec. 4, 1906).

Not surprisingly, President Roosevelt's action caused great distress to thousands of homesteaders who had entered upon and worked the land. *See* H.R. Rep. No.

2019, 60th Cong., 2d Sess., 1-3 (1909). To address homesteaders' valid concerns for their feared loss of time and labor in the land, and also to respond to the nation's need to protect and develop coal as an energy resource, Congress passed the Coal Lands Act of 1909 (the 1909 Act). This legislation reserved to the United States "all coal" contained in the withdrawn lands upon which entry had been made. It provided:

> Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and *upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands*, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. The owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit. Nothing herein contained shall be held to affect or abridge the right of any locator, selector, or land located, selected, or entered by him. Such locator, selector, or entryman who has made or shall make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of

> such final proof and entry it shall be shown that the land is chiefly valuable for coal.

(Mar. 3, 1909, c. 270, 35 Stat. 844) (emphasis added).

Although the 1909 Act addressed the concerns of homesteaders already settled on lands subsequently withdrawn, western congressional leaders remained concerned about future settlement of their region given the vast tracts withdrawn as coal lands:

> [U]nless we have some legislation whereby entrymen, under reasonable restrictions, can be prevailed upon to settle upon and cultivate such of these lands as are adapted to agricultural purposes, very extensive areas will remain entirely undeveloped and unproductive except as they are utilized for grazing purposes.

See H.R. Rep. No. 377, p. 3. *See also* S. Rep. No. 703, p.2; *See also* 45 Cong. Rec. 6050 (1910).

In response, Congress enacted the 1910 Coal Lands Act (the 1910 Act) containing provisions substantially similar to the 1909 Act but addressing prospective entries on lands classified as valuable for coal:

> That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of [sections 833 to 85 of this title], *the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented*, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented,

as provided by sections 83 to 85 of this title, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages. The owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

(June 22, 1910, c. 318, § 3, 36 Stat. 584) (emphasis added).

Over the next several decades more than 16 million acres in the west, including 1.35 million acres in Colorado, were patented under the 1909 and 1910 Acts. *See* U.S. Bureau of Land Management, *Public Land Statistics —1991*, p. 16 (1992). The patented lands in Colorado included the surplus lands on the Southern Ute Reservation which had been opened to non-Indian homestead entry. During the ensuing years then, numerous homesteaders were issued patents subject only to the United States' coal reservation. The non-federal defendant class

in this case claim their respective rights, titles, and interests as successors in interest to these patentees.

In the mid 1930's, the United States initiated a marked shift in Indian policy from "allotment and assimilation" which deemphasized tribal existence by granting land allotments to individual Indians, *see* F. Cohen *Handbook of Federal Indian Law* Ch. 2, Sec. C, 127 (1982), to a "revival of tribalism." *See* F. Cohen *Handbook of Federal Indian Law* Ch. 2, Sec. D, 145 (1982). This new emphasis on tribal self-determination found statutory expression in the Indian Reorganization Act of 1934. 48 Stat. 984, Ch. 576 (June 18, 1934), codified at 25 U.S.C. §§ 461-479 (1988) (IRA). The IRA in pertinent part provided:

> The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the *remaining surplus lands* of any Indian reservation opened . . . [before June 18, 1934] . . .
>
> *Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by [sections 461-479 of this title]*: . . .

25 U.S.C. § 463 (emphasis added) (italics in original).

In 1938, under the authority of the IRA, the Department of the Interior conveyed to the Tribe equitable title in approximately 200,000 acres of coal which previously had been reserved to the United States in patents issued over the years to non-Indian entrymen under the 1909 and 1910 Acts. The Tribe's claim in this action is based on the premise that reservation of the coal by the United States in the 1909 and 1910 Acts includes reservation of CBM gas which was restored to the Tribe in 1938 along with the coal.

As a result of the amalgam of methods by which one could obtain ownership of the land, presently the Tribe's

reservation is a checkerboard of different types of ownership interests including tribal lands held in trust by the United States for the benefit of the Tribe, lands held by the Tribe in its own name, individual Indian land allotments subject to federal trust restrictions, land owned in fee simple by individual Indians, and lands held in fee simple by non-Indians. *Southern Ute Indian Tribe v. Board of County Comm'rs*, 855 F.Supp. 1194, 1196 (D.Colo. 1994). With this historical backdrop about which I discern no genuine material factual dispute, I turn to the central issue in the case.

III.

The Ownership Question

The central question in this case is whether Congress included CBM gas in its reservation to the United States of "coal" under the Coal Lands Acts of 1909 and 1910.[1] I hold that, as a matter of law, Congress' reservation of coal in the United States in the Acts of 1909 and 1910 did not include reservation of CBM gas. Consequently, title to CBM gas in the lands at issue here was conveyed by United States patents issued to homesteaders under the 1909 and 1910 Acts upon surplus lands on the Tribe's reservation. Accordingly, the Tribe acquired no title to the CBM gas when, in 1938, under authority of the IRA, the United States restored the coal to the Tribe.

A.

Plain meaning

The Tribe argues that the meaning of the word "coal" in the Acts of 1909 and 1910 is ambiguous because it

[1] Although I eschew footnotes, the Tribe's allusion to historic injustices wrought upon the indigenous peoples of America through European colonialization and by the concomitant concept of "manifest destiny," compels this note. My task is to discern the intent of Congress in 1909 and 1910. It is beyond my jurisdiction and the issues framed in this case to engage in an eschatological analysis of the wrongs perpetrated against American Indians.

might refer not only to rock but also to the gas contained in and around the rock. I disagree.

Statutory construction is a matter of law to be decided by the court. *United States v. Montoya*, 827 F.2d 143, 146 (7th Cir. 1987). The primary task in construing a statute is "to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, —— U.S. ——, 113 S.Ct. 1119, 1122-23 (1993). The controlling congressional intent is that which exists as of the date of enactment of the statute. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 62 (1983). This rule has added significance here because the defendant class traces its ownership through chains of title beginning with U.S. patents issued under the 1909 and 1910 Acts. Thus, the relevant congressional intent is that which existed at the time of the passage of the Acts in 1909 and 1910.

In determining congressional intent, I look first to the language of the statute and assume that its plain meaning accurately expresses legislative purpose. *United States v. James*, 478 U.S. 597, 604 (1986); *Consumer Product Safety Comm'n v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States v. Shriver*, 989 F.2d 898, 901 (7th Cir. 1992). The apparent natural meaning of a statute will be preferred to any hidden, curious "signification." *United States v. Colorado & N.W.R.R.*, 157 F. 321, 332 (8th Cir. 1907). I assume that the legislative purpose is expressed by the ordinary meaning of the words used. *Id.* Moreover, "if words of common use [are contained in a statute, they] are to be construed in their natural, plain and ordinary significance." *Balanced Rock Scenic Attractions v. Town of Manitou*, 38 F.2d 28, 30 (10th Cir. 1930). The plain meaning of a word is not determined by reference to variations on its ordinary meaning, but by the ordinary meaning itself, *i.e.*, the way it is *generally* used. *Copeland v. MBNA America.*,

N.A., 820 F. Supp 537, 540 (D.Colo. 1993). When Congress does not define a specific term, I may presume also that the drafters intended its ordinary meaning to attach to the word. *Russello v. United States*, 464 U.S. 16, 21 (1983). It then is appropriate to look to general dictionary and encyclopedia definitions to ascertain the plain meaning of the word. *See Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617-18 (1944); *United States v. Jackson*, 759 F.2d 342, 344 (4th Cir. 1985); *Torti v. United States*, 249 F.2d 623, 626 (7th Cir. 1957). And, statutes should be construed in a common sense fashion. *See First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989).

The 1909 Act, codified at 30 U.S.C. § 81, provides that the patent "shall contain a reservation to the United States of *all coal in said lands* . . . ." (emphasis added). The parallel language in the 1910 Act, codified at 30 U.S.C. § 85, states that the "patent shall contain a reservation to the United States of *all the coal in the lands* so patented . . . ." (emphasis added)

The texts of the 1909 and 1910 Acts do not define the term "coal." General dictionaries and encyclopedias of the day, however, illustrate the common ordinary meaning of "coal." For example, the American Dictionary of the English Language 244 (1889) defined coal as "a black, or brownish black, *solid*, combustible substance consisting . . . mainly of carbon." (emphasis added). Indeed, this definition is consistent with the definition of coal throughout the decades. The Webster's New International Dictionary of the English Language published in 1920 defined coal as "a black, or brownish black, *solid*, combustible mineral substance . . . ." (emphasis added). *Id.* at 424. This definition of coal is not only virtually identical to the definition at the time of the passage of the Acts, but is also echoed by the current definition of

coal as "a black or brownish black *solid* combustible mineral substance . . . ." Webster's Third New International Dictionary 432 (1986) (emphasis added). I also note that current federal regulations define "coal" as ". . . combustible carbonaceous *rock*, classified as anthracite, bituminous, subbituminous, or lignite . . . ." 25 C.F.R. § 216.101 (1993) (coal on Indian lands) (emphasis added). *Butler v. USDA*, 826 F.2d 409, 413 n. 6 (5th Cir. 1987) (subsequent congressional statements, although worthy of less weight than contemporaneous ones, are entitled to careful consideration). The common meaning of "coal" has not changed in the last century.

Likewise, by way of comparison, at the time of the passage of the 1909 and 1910 statutes, "gas" was defined as "an aeriform fluid supposed to be permanently elastic . . . now applied to any substance when in the elastic or aeriform state." American Dictionary of the English Language 560 (1889). Three decades later, Webster's New International Dictionary of the English Language 892 (1920) defined "gas" as "an aeriform fluid, having neither independent shape nor volume, but tending to expand indefinitely." Today, "gas" is defined in the same way—"a fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely; . . ." Webster's Third New International Dictionary 937 (1986). Even more to the point, an encyclopedia of the day underscores the fundamental difference between the two substances in its discussion of the commonly understood relationship between CBM gas and coal:

> Gases, consisting principally of light carburetted hydrogen or marsh gas, are often present in considerable quantity in coal in a dissolved or occluded state, and the evolution of these upon exposure to air, especially when a sudden diminution of atmospheric pressure takes place, constitutes one of the

> most formidable dangers that the coal miner has to encounter.

VI Encyclopaedia Britannica 575 (University Press 1910).

In a more technical vein, scientific dictionaries have defined "coal" as "[a] *solid, brittle,* more or less distinctly stratified, combustible carbonaceous *rock,* formed by partial to complete decomposition of vegetation . . . ." *A Dictionary of Mining, Mineral, and Related Terms* 222 (1968) (emphasis added), and "a *solid* . . . substance varying in color from dark-brown to black, *brittle,* combustible, and used as a fuel. A. Fay, *A Glossary of the Mining and Mineral Industry 163 (1920).* (emphasis added). Again, in a parallel but more technical view, "gas" is defined as:

> A state of matter in which cohesive forces are practically nonexistent and therefore the motion of the molecules is unrestrained. A gas has neither definite shape nor volume.

J. Henderson, *Metallurgical Dictionary* 151 (1953).

Common to all of the foregoing definitions is the description of "coal" in narrow, specific terms within which CBM gas does not fit. In contrast, "gas" is consistently defined in broad, general terms within which CBM gas clearly does fit.

My examination of these many varied sources leads to the inexorable conclusion that in 1909 and 1910, motivated by the burning need to protect and develop the nation's primary fuel resource, Congress intended to impart to the term "coal" its ordinary and common meaning as a solid rock fuel. Even without aid of reference to such definitional sources, common sense dictates that in 1909 and 1910, Congress intended "coal" to mean the solid rock substance. Hence, it is not surprising that Congress did not undertake definition of this simple term. It is also significant that the texts of the 1909 and 1910

Acts mention "coal" at least 20 times, but the term "gas" is not used once. Neither is the term "constituent" found in either Act. Under these circumstances, it would require not merely some, but herculean ingenuity to create ambiguity in the 1909 and 1910 Acts. *See Rothschild & Bro. v. United States,* 179 U.S. 463, 465 (1990). *Cf. TVA v. Hill,* 437 U.S. 153, 173 n. 18 (1978) (assertions of ambiguity do not transform a clear statute into an ambiguous provision).

Notwithstanding these persuasive considerations for regarding "coal" as the solid rock mined from the ground, the Tribe argues that I give effect to a technical and scientific view that CBM gas is an inherent constituent of the coal and, thus, intended by Congress to be included in its mineral reservation of coal to the United States. As I understand it, present day scientists who are experts in the field disagree whether CBM gas is part of coal. *See e.g.* Mavor, Matthew J., *Overview of Coal Gas Reservoir Structure, Fluid Dynamics, and Completion Technology (January 15, 1993)* (CBM gas is separate and distinct from coal itself) (Amoco Exhibit 114); Levine, Jeffrey R., *A Brief Review of The Origin, Composition, and Mode of Occurrence of Natural Gas in Coal Beds (August 9, 1989)* (although scientific evidence is conflicting, there is considerable scientific merit to argument that CBM is a constituent of coal) (Amoco Exhibit 117); *Affidavit of Harry M. Marsh, Ph.D.* (CBM gas is one substance that makes up coal) (Tribe's Exhibit 2-H).

For two reasons, this present divergence in scientific opinion creates neither a genuine issue of material fact nor an ambiguity in the Acts. First, I must derive congressional intent as of the date of enactment. *Watt,* 462 U.S. at 62 (1983). Second, the Acts dealt with a practical subject in a practical way, and Congress intended that the term "coal" should be applied in its ordinary

and popular sense. *See e.g. Burke v. Southern Pac. R.R.*, 234 U.S. 669, 678 (1914) (interpreting mineral lands statute to include petroleum as a mineral). Thus, I conclude that Congress did not intend to reserve CBM gas in the 1909 and 1910 Acts but only the solid rock coal.

B.

Secondary Analysis

When, as in this case, no ambiguity is found in the statute, judicial construction is ordinarily complete. *O'Connor v. U.S. Dept. of Energy*, 942 F.2d 771, 773 (10th Cir. 1991). Although I do not think it necessary to resort to secondary materials or other rules to glean congressional intent, assuming the term "coal" is ambiguous in the 1909 and 1910 Acts, resort to such aids leads to the same result here. Congress did not intend to reserve CBM gas but only the solid coal.

Although the starting point is the language of the statute itself, I may look to extrinsic aids including legislative history and the construction placed on the statute by the agency which administers it. *Amgen Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990). Clear evidence of legislative intent prevails over other principles of statutory construction. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988). In interpreting language in a statute, a court may look to its object and policy. *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990). Remarks of the sponsor of legislation as reported in the congressional record are an "authoritative guide" to its construction. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *Nuclear Regulatory Comm'n v. Federal Labor Relations Authority*, 879 F.2d 1225, 1230 (4th Cir. 1989). Also, the circumstances under which the legislation was enacted are relevant to its construction. *Commissioner of Internal Revenue v. Engle*, 464

U.S. 206, 217 (1984); *FDIC v. Isham*, 777 F.Supp. 828, 831 (D.Colo. 1991). If Congress knows how to express itself and chooses not to, its silence is probative of intent. *See In re Providence Television Ltd. Partnership*, 75 B.R. 139, 140 (N.D.Ill. 1987).

1. *Legislative History*

Because my focus is on the intent of Congress at the time the statute was enacted, *Watt*, 462 U.S. at 62, I look to the legislative history of the Acts including, to the extent possible, what Congress then knew about the subject of its legislation. *FDIC v. Isham*, 777 F.Supp. at 831.

When the 1909 and 1910 Acts were passed, CBM gas was not known as a valuable mineral. To the contrary, it was common knowledge that CBM gas was a deadly hazard associated with coal mining. *See e.g.* J. Fassett, "Coalbed Methane—A Contumacious, Free-Spirited Bride; the Geologic Handmaiden of Coalbeds," *Energy Frontiers in the Rockies* 131 (1989). For example, caged canaries were kept in coal mines to serve as "early warning gas detectors." More dramatically, "firemen" exploded collected gas in the mine by wrapping themselves in fire-resistant blankets saturated with water. The "firemen" would then creep forward in the mine and cause an explosion by projecting a candle at the end of a long pole into an area where CBM gas had collected, then fling themselves on the ground while the flames passed overhead. Dexter S. Kimball, *Book of Popular Science* 412 The Grolier Society, Inc. 1952 (1924).

Transcripts of the extensive committee hearings and debates conducted on the proposed coal lands legislation illustrate congressional knowledge of the subject of coal. The House of Representatives Committee on the Public Lands on Coal Lands and Coal-Land Laws of the United States (Committee) was responsible for authoring the

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bills that became the 1909 and 1910 Acts. That committee had the benefit of several United States Geological Survey (USGS) reports addressing various aspects of the "coal issue." *See* e.g. George H. Ashley, *The Value of Coal Land, reprinted in, The Valuation of Public Coal Lands,* U.S.G.S. Bulletin 424, 3-47, H.R. Doc. No. 502, 61st Cong., 2d Sess. (1910); Marius R. Campbell, *Character and Use of the Yampa Coals, reprinted in, The Yampa Coal Field, Routt County, Colorado,* U.S.G.S. Bulletin 297, 82-96, H.R. Doc. No. 936, 59th Cong., 1st Sess. (1906); Marius R. Campbell, *Contributions to Economic Geology,* 1906, *Part II—Coal, Lignite, and Peat* U.S.G.S. Bulletin 316, 5-12, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1906); Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust,* U.S.G.S. Bulletin 383, 3-67, H.R. Doc. No. 1538, 60th Cong., 2d Sess. (1909); Rollin T. Chamberlin, *Papers on the Conservation of Mineral Resources,* U.S.G.S. Bulletin 394, 1-26, H.R. Doc. No. 1554, 60th Cong., 2d Sess. (1909); Arthur J. Collier, *The Coal Resources of the Yukon, Alaska,* U.S.G.S. Bulletin 218, 1-71, H.R. Doc No. 63, 58th Cong. 2d Sess. (1903); Arthur J. Collier, *Geology and Coal Resources of the Cape Lisburne Region, Alaska,* U.S.G.S. Bulletin 278, 1-54, H.R. Doc. No. 826, 59th Cong. 1st Sess. (1906); Robert H. Fernald, *The Present Status of the Producer-Gas Power Plant in the United States, reprinted in, Contributions to Economic Geology,* 1906, Part II— *Coal, Lignite, and Peat,* U.S.G.S. Bulletin 316, 439-459, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1906); Cassius A. Fisher, *Depth and Minimum Thickness of Beds as Limiting Factors in Valuation, reprinted in, The Valuation of Public Coal Lands,* U.S.G.S. Bulletin 424, 48-75, H.R. Doc. No. 502, 61st Cong., 2d Sess. (1910); G.B. Richardson, *Natural Gas Near Salt Lake City, Utah, reprinted in, Contributions to Economic Geology,* 1904, U.S.G.S. Bulletin 260, 480-83, H.R. Doc. No. 401, 58th Cong., 3d Sess. (1905); Frank C. Schrader & Erasmus Haworth, *Oil and Gas of the Independence Quadrangle, Kansas, reprinted in, Contribution to Economic Geology,* 1904, U.S.G.S. Bulletin 260, 446-458, H.R. Doc. No. 401, 58th Cong., 3d Sess. (1905); Millar K. Shaler, *A Reconnaissance Survey of the Western Part of the Durango-Gallup Coal Field of Colorado and New Mexico, reprinted in, Contribution to Economic Geology,* 1906, *Part II—Coal, Lignite, and Peat,* U.S.G.S. Bulletin 316, 376-426, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1906) and Joseph A. Taff, *The Durango Coal District, Colorado, reprinted in, Contribution to Economic Geology,* 1906, *Part II—Coal, Lignite, and Peat,* U.S.G.S. Bulletin 316, 321-337, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1906). A pervasive theme in these reports is the focus on coal as the primary energy resource for the United States. Concern for supply and demand is evident in one report by Marius Campbell, U.S.G.S. Geologist in Charge of the coal project:

> The need for information [about coal] is imperative, for, although the amount of coal . . . seems so great as to be well-nigh inexhaustible, the consumption is increasing so rapidly that already the question of a future supply of fuel is a serious one and the Government is surely justified in using every means possible to conserve the supply for the use of future generations.

Marius R. Campbell, *Contributions to Economic Geology,* 1906, *Part II—Coal, Lignite, and Peat* U.S.G.S. Bulletin 316, 5-6, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1906).

The Committee also had the benefit of Mr. Campbell's knowledge about coal when he testified in person before them. *See Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands,* 59th Cong., 2d Sess. (1907). The Committee hearings transcripts show that Congress was aware of the

association of CBM gas with the coal and that possibly one day the CBM gas might have value. During his testimony, Campbell speculated, "[i]t may be that gas will finally be adopted generally [for the production of power] —either gas from oil or gas from coal." *Id.* at 19. Nevertheless, no one, including Campbell, opined in written reports or congressional testimony that CBM gas was a valuable energy resource which ought to be reserved to the United States in the Acts. *See e.g.* Marius R. Campbell, *Contributions to Economic Geology, 1906, Part II—Coal, Lignite, and Peat,* U.S.G.S. Bulletin 316, 1-6, H.R. Doc. No. 823, 59th Cong., 2d Sess. (1907) and Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust,* U.S.G.S. Bulletin 383, 1-67, H.R. Doc. No. 1538, 60th Cong., 2d Sess. (1909). *See also Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands,* 59th Cong., 2d Sess. (1907). Indeed, Campbell had written "[c]oal . . . is the fuel of the present, and, so far as can be see, will continue to lead . . . for a long time to come." Campbell, U.S.G.S. Bulletin 316 at 6. Also, in analyzing estimates of future coal production, both Campbell and his co-author Edward W. Parker, prognosticated that water power was the future source of energy which would prolong the life of the country's coal supply. Marius R. Campbell and Edward W. Parker, *Coal Fields of the United States,* U.S.G.S. Bulletin 394, 28-29 (1909).

I next look to comments of congressional representatives themselves as evidence of what Congress meant by its use of the word "coal." *Nuclear Regulatory Comm'n v. Federal Labor Relations Authority,* 879 F.2d at 1230. Their dialogue lends clarity and meaning to the Acts in contrast with the studied and intentional ambiguity injected in current legislation by members of Congress. *See e.g.* Civil Rights Act of 1991. On February 16, 1909, Congressman Mondell of Wyoming, Chairman of the Committee and sponsor of the 1909 and 1910 Acts addressed

the House of Representatives about the 1909 Act which, in his words, was written "for protection of the rights of surface entrymen." 45 Cong.Rec. 2502 (1909). Consistent with this concern, the scope of the 1909 Act was limited to providing relief for those homesteaders who had entered lands before the lands were withdrawn because they were deemed by the U.S.G.S. to be "chiefly valuable for coal." *See* 45 Cong. Rec. 6040-41 (1910); H.R. Rep. No. 377, 61st Cong., 2d Sess., 4 (1910).

In anticipation of putting the bill to a vote, Rep. Mondell spoke at length about "the purposes of this bill." 45 Cong.Rec. 2502-04 (1909). Never once did Mondell mention or refer to CBM gas or any other "constituent" of coal. *Id.* The following exchange occurred when the specific scope of the reservation was questioned:

> Mr. STEPHENS (Texas): I desire to know the difference between this law which the gentleman proposes and the law as it now exists. What change is proposed, and why?
>
> Mr. MONDELL (Wyoming): . . . It is the *first legislation before Congress providing for a limited patent,* or a patent reserving the mineral. . . .
>
> Mr. STEPHENS: Is it not a fact that valuable minerals are reserved now to the Government?
>
> MR. MONDELL: No; that is not true. The patent having issued, the patent carries everything in the land with it, and the Supreme Court has decided in a number of cases that if the law be complied with in good faith and the entryman makes payment and final proof, thereafter the Government is barred from raising the question as to any mineral that may occur in the land.
>
> Mr. STEPHENS: That applies also to oil and coal?
>
> Mr. MONDELL: It applies to all kinds of minerals. In other words, *the patents issued by the Gov-*

ernment of the United States heretofore have been patents in fee.

Mr. STEPHENS: Could the gentleman better arrive at what he desires by only patenting the surface of the land and *reserving all minerals, precious and otherwise?*

Mr. MONDELL: That has been discussed at some length, and *the Committee on Public Lands is not of the opinion that ought to be done.* We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some *coals* of value.

Mr. STEPHENS: Is not this a step in that direction of issuing *limited* patents?

Mr. MONDELL: It is; and I trust it is as far as we will go in that direction.

45 Cong.Rec. 2504 (1909) (emphasis added).

Congress enacted the bill and on March 3, 1909 the President signed the 1909 Act into law.

The scope of the 1909 Act being limited to entries before withdrawal, concern remained as to those lands not yet entered upon for homesteading. Under the "chiefly valuable for coal" criterion, in Colorado alone "over 9,000,000 acres of land [were] withdrawn as coal lands." 45 Cong.Rec. 6050 (1910). As I noted earlier, representatives were particularly concerned that the withdrawals would retard expansion and settlement of the west. *See* H.R. Rep. No. 377, p. 3. *See also* S. Rep. No. 703, p. 2; 45 Cong. Rec 6050 (1910). As I noted earlier, Congressman Mondell introduced the 1910 Act, modeled after the 1909 Act. Once again, before it was enacted, the purpose and scope of the bill was debated by the House:

Mr. STEPHENS (Texas): Why is it necessary to preserve and reserve to the Government the *coal* and not at the same time reserve to the Government *other fuels such as gas and oil?*

45 Cong. Rec. 6044 (emphasis added).

. . .

Mr. MONDELL (Wyoming): . . . Oil and gas present much greater difficulties [than coal], when we propose to separate the surface from the mineral, ...

Id.

Congressional understanding of the nature of the coal is further exemplified in the following statements by Representative Ferris:

Mr. FERRIS (Oklahoma): . . . [T]his is an important matter; . . . it involves every *ton of coal* in the United States . . . .

Id. at 6046. (emphasis added).

After they have prospected and before they can *mine or remove one pound or one ton of coal* . . . .

Id. (emphasis added).

. . . we have the undoubted right to surround the reservation of coal with reasonable restraint, *so that the coal will not get away from us.*

Id. (emphasis added).

Now pause a moment and let me show what you have got to do in order to *remove the coal, the ultimate object to be obtained.*

Id. at 6048. (emphasis added).

These debates reflect Congress' clear intent in the 1909 and 1910 Acts to depart in the most narrow way possible from the historic practice of the United States to grant

fee simple absolute title to homesteaders. This narrow departure took the form of granting a patent with reservation of coal but not of oil, *gas*, or any other minerals. In addition, it is significant that coal was referred to by the "ton" as a solid to be "mined" from the land. Use of such terms lends additional support to my conclusion that Congress intended to reserve only the solid rock coal. Moreover, the overriding object of Congress was to insure an adequate source of the nation's primary energy resource. That was coal as commonly understood to be a solid rock.

The treatment of coal in public lands legislation before and after the 1909 and 1910 Acts is also indicative of Congressional intent underlying those Acts. *See Aulston*, at 589. Consistent with its role as the nation's primary energy resource, coal was treated separately from all other minerals in the legislative scheme of the 19th century. In 1864, Congress passed legislation aimed at promoting expansion and settlement of the west by authorizing entry on coal lands. 13 Stat. 343 (1864). Upon fulfilling certain conditions, including payment of not less than either $10 or $20 per acre depending on the distance of the land from a railroad, an entryman would receive a fee simple absolute patent. *See e.g.* 17 Stat. 607 (1873); 13 Stat. 529 (1865); 13 Stat. 343 (1864). Soon thereafter, Congress also enacted legislation addressing the method by which entrymen could obtain patents to lands valuable for all types of mineral deposits other than coal. 14 Stat. 251 (1866) (similar provision codified as 30 U.S.C. § 22). *See also* 17 Stat. 91 (1872) (codified as 30 U.S.C. § 26); 16 Stat. 217 (1870).

A chronological examination of public lands acts from 1864 to the present, highlights a conscious legislative intent to move methodically from issuance of fee simple absolute patents, to issuance of patents with a narrow mineral reservation, and finally to the issuance of patents

with the broadest reservation possible of valuable mineral rights in the government. In its initial departure from issuing unlimited patents, Congress passed the 1909 and 1910 Acts which reserved a single mineral—coal. The next legislative reservation of minerals occurred in the Act of 1914, 30 U.S.C. § 121. There, Congress broadened the scope of mineral reservation by enumerating specific minerals to be reserved—"phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals." (emphasis added).

During congressional proceedings on the 1914 Act, Rep. Mondell, sponsor of the 1909 and 1910 Acts, spoke once more about the scope of mineral reservations in the United States:

> Mr. MANN: Under such circumstances, where the land has been withdrawn for [asphaltic minerals] and we give a surface title, why should not the government reserve *all* of the minerals under the surface?
>
> . . .
>
> Mr. MONDELL: Mr. Speaker, the gentleman's suggestion relates to a general mineral reservation. . . . The moment you *depart from the kind of reservation that we have heretofore provided for in the case of coal, and which we are now extending to these other minerals*—the moment you depart from that *theory of the reservation of those minerals only for which the land is withdrawn*—you must logically go to the extreme of withholding all minerals.
>
> Mr. MANN: Why not do that?
>
> Mr. MONDELL: That is a pretty large question, and it has been argued here several times . . . .
>
> . . .
>
> Mr. MONDELL: Mr. Speaker, the monarchical theory is to reserve all minerals to the crown, upon the theory that the mere subject is not entitled to anything except the soil that he stirs. It [reserva-

> tion of minerals to the government] is . . . a relic of monarchical government, of peonage, if you please . . . .
>
> Our fathers departed from that plan. I do not think we should dispose of lands in fee simple for agricultural purposes that do unquestionably or probably contain *valuable minerals,* and we are reserving in such lands the minerals which they are believed to contain . . . and it seems to me that is going quite far enough, and that it would not be wise to go further. *It is a rather radical departure from our past practice to [now] make a general reservation of all of the minerals. It should not be done. But if you are going to depart from the principle in this bill, which is the principle in the coal bill which passed a couple of years ago, there is no middle ground. It is either a reservation of . . . minerals which the lands are believed to contain or it is a reservation of all minerals. . . .*

51 Cong. Rec. 10493-94 (1914) (emphasis added).

Two years later, Congress enacted the Homestead Act of 1916, 43 U.S.C. § 299, which contained the broadest mineral reservation to date—"all the coal and other minerals."

What emerges from this abundant legislative history is a clear expression of congressional intent to move from its initial policy of no mineral reservation, to a progressive widening of the scope of its mineral reservation from the most narrow reservation to the broadest possible. Comparison of the terms of the 1864 Coal Lands Act, the 1909 and 1910 Acts, the 1914 Act, and the Homestead Act of 1916 demonstrates that Congress knew how to reserve specific minerals when it chose or to make a broad reservation of minerals when it chose. Hence, overwhelming legislative history leads to the inescapable conclusion that when the 1909 and 1910 Acts were passed,

Congress did not intend to include CBM gas in the reservation of the "coal" to the United States.

In the face of overwhelming legislative intent that Congress did not intend to reserve CBM gas in the 1909 and 1910 Acts, the Tribe relies on two well-established principles in advancing its claim that CBM gas is part of the reserved coal. First, nothing passes by implication in a public land grant and, second, such grants should be interpreted in favor of the government. *Andrus v. Charlestone Stone Products Co. Inc.,* 436 U.S. 604, 617 (1978). The Tribe overlooks, however, an equally well established exception to these rules. Public land grants "are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. *Leo Sheep Co. v. United States,* 440 U.S. 668, 682-83 (1979), *quoting United States v. Denver & Rio Grand R.R.,* 150 U.S. 1, 14 (1893). In this case, the intent of Congress is clear, or at the very least, it is fair to imply, that the reservation of "coal" did not include CBM gas.

Next, the Tribe asserts the general rule applied in Indian matters that whenever doubt or ambiguity exists in federal Indian statutes or regulations, such doubt is resolved in favor of the tribes. *See, e.g., Oneida County, N.Y. v. Oneida Indian Nation of N.Y.,* 470 U.S. 226, 247 (1985); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 149 (1984); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.,* 458 U.S. 832, 838 (1982). However, the 1909 and 1910 Acts are not federal Indian laws. Rather, they are public land laws. While the Acts arguably may now affect Indian lands, the Acts were not passed for tribal benefit. Thus, this rule is inapposite in this case.

2. *1981 Solicitor's Opinion*

I also look to the effect of an opinion issued in 1981 by the Solicitor to the Secretary of the Interior addressing the issue of "who owns the coalbed gas in land where the coal or oil and gas was reserved to the U.S . . ." *Ownership Of And Right To Extract Coalbed Gas in Federal Coal Deposits,* 88 I.D. 538, 539 (1981). Although the Solicitor did not specifically address minerals on Tribal lands, the opinion concluded that "the reservation of coal to the United States in the Act of Mar. 3, 1909 and the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976), did not include the coalbed gas found in the reserved coal." *Ownership,* 88 I.D. at 540.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) controls the analysis for evaluating the weight to be given the Solicitor's decision:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. (fn. omitted).
>
> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (fn omitted).

Chevron, at 842-43. *See also Sullivan v. Everhart,* 494 U.S. 83, 88-89 (1990); *Exxon Corp. v. Lujan,* 970 F.2d 757, 759 (10th Cir. 1992). In determing whether the agency's construction of the statute is permissible, a reviewing court need not conclude that the agency's construction is the only one it could have adopted or even that the construction is the one the court would have reached if it were initially deciding the issue. *See e.g.*

Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981). Rather, the agency's decision is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* at 844. The Acts of 1909 and 1910 neither mention CBM gas nor contain a definition of "coal." Thus, under the *Chevron* analysis I turn to whether the Solicitor's opinion is based on a permissible construction of these statutes.

In a well-reasoned opinion, the Solicitor thoroughly and meticulously considered the historical context surrounding the passage of the 1909 and 1910 Acts, the legislative history of the Acts, and measured the treatment of "coal" on the one hand and "gas" on the other in subsequent federal legislation and regulations. The Solicitor concluded that CBM gas was not part of the coal estate reserved to the United States. *Ownership,* at 540, 549. I independently reach the same conclusion. It follows then that in my view the Solicitor's conclusion that Congress' use of the term "coal" did not include CBM gas is not "arbitrary, capricious or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843.

To summarize, I conclude Congress intended to give the term "coal" in the 1909 and 1910 Acts its common ordinary meaning. Congress intended "coal" to mean the solid black rock mineral contained in the ground and not CBM gas. Assuming *arguendo* the term "coal" renders the Acts ambiguous, I conclude that at the time of their passage, there was no intent on the part of Congress to include CBM gas in its reservation of coal to the United States in the Acts. Furthermore, and in any event, I grant deference to the 1981 Solicitor's opinion that Congress' use of the term coal does not include CBM gas. In short, all modes of legislative analysis of congressional intent point but one way. CBM gas was not reserved to the United States in the Coal Lands Acts of 1909 and

1910. CBM gas, therefore, was conveyed by patents issued to the lands in question and, thus, was not restored to the Tribe in 1938 under the IRA.

IV.

Common Defenses

As stated at the outset, in addition to the central issue of ownership I also certified the defendant class to address application to the ownership question of certain defenses said to be common to the defendant class. This question has also been exhaustively briefed and argued including application of the Nonintercourse Act, 25 U.S.C. § 174 and allocation of Rule 56 burdens under 25 U.S.C. § 194. Having held for the class on the question of ownership, however, I need not address further the application of the common defenses to the ownership question or the application of the Nonintercourse Act.

V.

Federal Defendants

Also before the court is the federal defendants' motion to dismiss or alternatively, for summary judgment addressed to the Tribe's "Eleventh Claim for Relief":

> 74. The Federal Defendants have breached their fiduciary duties to the Tribe by permitting or acquiescing in the extraction of substances from the coalbeds or strata, or the extraction of constituent, inherent and integral components of the Tribe's Reserved and Restored Coal and the Subject Lands without the consent of the Tribe and in violation of various federal laws including, but not limited to, 25 U.S.C. § 177, 25 U.S.C. § 396a, 25 U.S.C. § 2101 U.S. et seq., and 25 U.S.C. § 476.

Plaintiff's First Amended Complaint.

The sole premise argued by the federal defendants in support of their motion for summary judgment is that a claim based on breach of a trust duty to manage the Tribe's CBM gas resource must fail because the Tribe does not own the CBM gas. I agree. Based on my ruling that, as a matter of law, the Tribe does not own the CBM gas, it follows *a priori* that the federal defendants have no fiduciary duty to the Tribe to manage the CBM gas for the benefit of the Tribe. Therefore, I will grant the federal defendants' motion for summary judgment on the issue of breach of fiduciary duty to manage the CBM gas as a tribal resource.

In support of their motion to dismiss, the federal defendants argue that the Tribe's claim for relief against the United States for breach of fiduciary duty is barred by the statute of limitations contained in 28 U.S.C. § 2401(a). In turn, the nonfederal defendants argue that if this action is dismissed against the federal defendants it must also be dismissed against them because the federal defendants are indispensable under Fed.R.Civ.P. 19. Based on my ruling on the ownership issue, however, I do not reach either issue.

The Tribe's Eleventh Claim against the federal defendants is broader than the issue of breach of fiduciary duty based on CBM gas addressed in this opinion and order. For example, it may encompass some duty to ensure mitigation of damage to the coalbed strata caused by CBM gas extraction. Because the federal defendants' motion for summary judgment addressed only its duty stemming from the Tribe's ownership claim, other issues concerning these defendants remain for a later day.

Accordingly, it is ORDERED that

1. Amoco's, motion for summary judgment is GRANTED on the question of ownership of CBM gas and judgment shall enter in favor of the defendant class against the plaintiff Tribe upon its claim for declaration of ownership of CBM gas in the lands at issue;

2. Amoco's motion for summary judgment on the class action defenses is DENIED as moot based on the conclusion that the Tribe does not own the CBM gas;

3. the Tribe's motion for summary judgment is DENIED;

4. federal defendants' motion for summary judgment is GRANTED but only on the issue of breach of fiduciary duty for failure to manage the CBM gas;

5. a further scheduling and status hearing will be held on November 4, 1994 at 3:00 p.m. at which time I will consider Fed.R.Civ.P. 54(b) certification. Ten days in advance of the hearing, the parties shall submit an agreed proposed form of Rule 54(b) order together with proposed form of judgment to be certified. Any areas of disagreement in the proposed forms are to be specified along with reason therefor, and supplemented by suggested alternative language.

Date: February 1, 1995 *nunc pro tunc* to September 13, 1994.

BY THE COURT

/s/ Lewis T. Babcock
LEWIS T. BABCOCK,
Judge

APPENDIX D

STATUTORY PROVISIONS

(United States Code, Title 30)

§ 81. Rights of entrymen of lands subsequently classified as coal lands; disposal of coal deposits

Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. The owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit. Nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has made or shall make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

§ 83. Homestead or desert-land and other entries

Unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section 641 of Title 43, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under section 218 of Title 43. Those who have initiated non-mineral entries, selections, or locations in good faith, prior to June 22, 1910, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in sections 83 to 85 of this title.

§ 84. Applications for entry

Any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act [43 U.S.C.A. § 641], and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of sections 83 to 85 of this title.

§ 85. Patents for lands, with reservation of coal; disposal of coal deposits

Upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of sections 83 to 85 of this title, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by sections 83 to 85 of this title, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages. The owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consid-

eration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

APPENDIX E

CLASSIFICATION AND VALUATION OF COAL LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D.C.,
April 10, 1909.

1. For the purposes of classification and valuation, coal deposits shall be divided into four classes:

(A) Anthracite, semianthracite, coking, and blacksmithing coals;

(B) High-grade bituminous noncoking coals having a fuel value of not less than 12,000 B. T. U. on an unweathered, air-dried sample;

(C) Bituminous coals having a fuel value of less than 12,000 B. T. U. on an unweathered, air-dried sample, and high-grade subbituminous coals having a fuel value of more than 9,500 B. T. U. on an unweathered, air-dried sample;

(D) Low-grade subbituminous coals having a fuel value below 9,500 B. T. U. on an unweathered, air-dried sample, and all lignite coals.

CLASSIFICATION OF COAL LANDS.

2. Lands underlain by coal beds, none of which contain 14 inches or over of coal, exclusive of partings, of class A, B, or C, or over 36 inches of class D, shall be classed as noncoal land.

3. Lands containing coals of classes A and B of any thickness at depths greater than 3,000 feet, shall be classified as noncoal lands, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 3,000-foot shaft.

4. Lands containing coals of class C of any thickness at a depth greater than 2,000 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 2,000-foot shaft.

5. Lands containing coals of class D of any thickness at a depth greater than 500 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coals lies within one mile of the outcrop or point at which it can be reached by a 500-foot shaft.

VALUATION OF COAL LANDS.

6. The price of coal lands of classes A, B, and C shall be determined on the basis of estimated tonnage at the rate of one-half to 1 cent per estimated ton for class C; 1 to 2 cents per estimated ton for class B; and 2 to 3 cents per estimated ton for class A, when the lands are within fifteen miles of a completed railroad, and half that much when at a greater distance, but the price shall in no case exceed $300, except in districts which contain large coal mines where the character and extent of the coal are well known to the purchaser. When, however, topographic conditions affect the accessibility of the coal, the land within the 15-mile limit may be given a lower valuation, but in no case shall it be placed at less than the minimum.

7. The rates per ton in the preceding paragraph are based on the assumption that only one bed of coal is present. If more than one bed occurs in any tract of land in such relationship that the mining of one will not necessarily disturb the other, then for the second bed there shall be added to the price of the first bed 60 per cent of the value of the second bed according to the schedule; 40 per cent of the value of the third, and 30 per cent of the value of each additional bed, but the estimated price for coal shall in no case exceed $300, except in districts which contain large coal mines where the character and

extent of the coal deposits are well known to the purchaser.

8. The tonnage shall be estimated for the purpose of valuation on the basis of 1,000 tons recovery per acre-foot.

9. The coal price of lands of class D shall be the minimum provided by law, $20 per acre when within fifteen miles of a railroad and $10 per acre when at a greater distance.

10. In all valuations of coal lands any special conditions enhancing the value of the land for coal-mining purposes shall be taken into consideration.

11. When only a part of a smallest legal subdivision is underlain by coal, the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but in no case shall this be less than the minimum provided by law.

12. When lands which were at time of classification more than fifteen miles from a railroad are brought within the 15-mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

13. Except in case of entries now pending, or entries made prior to classification, review of classification or valuation may be had only upon application therefor to the Secretary, accompanied by a showing clearly and specifically setting forth conditions not existing or known at time of examination.

Approved:

R. A. BALLINGER,
Secretary.

APPENDIX F

DECISION OF THE DEPARTMENT OF THE INTERIOR

OWNERSHIP OF AND RIGHT TO EXTRACT COALBED GAS IN FEDERAL COAL DEPOSITS

M-36935

May 12, 1981

Act of March 3, 1909—Act of June 22, 1910—Patents of Public Lands: Reservations

Patents issued pursuant to the Act of Mar. 3, 1909, or the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976) reserved to the United States "all coal" and the right to prospect for, mine and remove the "coal deposits" underlying the patented lands. Congress in the 1909 and 1910 Acts intended to, and did, reserve only the coal and not other minerals found in association with coal. Accordingly, all minerals other than coal, including coalbed gas, passed to the surface owner at the time a patent was issued pursuant to the 1909 or 1910 Acts.

Act of July 17, 1914—Patents of Public Lands: Reservations

Should coalbed gas occur in lands in which "oil and gas" were reserved to the United States in agricultural patents issued under the Act of July 17, 1914, 30 U.S.C. § 121 (1976), that coalbed gas is reserved to the United States.

Mineral Leasing Act: Methods of Development—Oil and Gas Leases: Generally

The MLA refers only to "gas" or "natural gas" without any qualifying adjectives, thus supporting a nonrestrictive reading of those terms to include coalbed gas. Coalbed gas is leasable under the oil and gas leasing provision of the MLA, 30 U.S.C. § 226 (1976).

Coal Leases and Permits: Leases—Mineral Leasing Act: Methods of Development

Coalbed gas is not included in a coal lease under the MLA. In the coal leasing provision of the MLA, Congress did not provide for a coal lessee's extraction of minerals related to or associated with coal. 30 U.S.C. § 201 (Supp. II 1978). This provision does not authorize a coal lessee's extraction of coalbed gas, other than the venting of the gas required by mine health and safety laws and regulations.

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: OWNERSHIP OF AND RIGHT TO EXTRACT COALBED GAS IN FEDERAL COAL DEPOSITS

Federal coal deposits may contain large quantities of recoverable coalbed gas. Due to its flammability and to the danger it poses to underground mining, this gas,[1] often referred to as methane,[2] has long been feared by the

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[1] Coalbed gas is a byproduct of coalification, the process through which plant material buried in sediments is successively transformed from peat into lignite, subbituminous coal, bituminous coal and finally anthracite. E. Craig and M. Myers, *Ownership of Methane Gas in Coalbeds*, 24 Rocky Mtn. Mineral Law Institute 767-68 (1978) (hereinafter cited as "Craig and Myers").

[2] Methane (CH_4), a colorless, odorless, flammable gas, is the primary component of coalbed gas. A. Kim, *Estimating Methane Content of Bituminous Coalbeds from Adsorption Data*, U.S. Department of the Interior, Bureau of Mines, Report of Investigations (USBM RI) 8245 L (1977). "During the biogenic stage of coal

coal mining industry.[3]

Although traditionally coal mining practices have wasted the gas by venting it into the atmosphere, there is curently a great deal of interest in developing coalbed gas as an energy source in its own right.[4]

Deep coalbeds in the Appalachian region are the most likely source of commercially marketable gas, but preliminary studies show that deep coalbeds in the West may also contain recoverable gas.[5] A number of studies, including research by the Department of Energy, have concluded that recovery of coalbed gas is commercially and technically feasible.[6] However, the unresolved legal status of coalbed gas on federal lands and in federal coal has hindered any decision on how, and under what right of extraction, it can be developed. In order to expedite development of this energy source, the Department must resolve two issues: (1) who owns the coalbed gas in land where the coal or oil and gas was reserved to the United States; and (2) whether the coal or the oil and gas leasing provisions of the Mineral Lands Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1976) (Mineral

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formation, methane is the predominant gas produced. * * * During the diagenetic stage of coalification, methane and other hydrocarbons are produced." A. Kim, *Experimental Studies on the Origin and Accumulation of Coalbed Gas*, USBM RI 8317, at 16 (1978).

[3] *See* U.S. Bureau of Mines Information Circular No. 7900 (1963); M. Irani, C. Timmons, T. Bobbick, M. Deul and M. Zabetakis, *Methane Emission from United States Coal Mines, A Survey*, Bureau of Mines Information Circular No. 8558 (1972); M. Zabetakis, M. Deul and M. Skow, *Methane Control in United States Mines, Bureau of Mines*, Circular No. 8600 (1973).

[4] *See* Office of the White House Press Secretary, "Fact Sheet on the President's Import Reduction Program II" (July 16, 1979).

[5] P. McGinley, *Legal Problems Relating to Ownership of Gas Found in Coal Deposits*, 80 W. Va. L. Rev. 369, 372-73 (1978) (hereinafter referred to as "McGinley").

[6] *See* McGinley, *supra* note 5, at 375-77.

Leasing Act of MLA) apply to the leasing of coalbed gas for commercial development.

For the reasons set forth below, I conclude that: (1) the reservation of coal to the United States in the Act of Mar. 3, 1909 and the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976), did not include the coalbed gas found in the reserved coal; (2) the reservation of oil and gas to the United States in the Act of July 17, 1914, 30 U.S.C. §§ 121-123 (1976) included coalbed gas found in the lands patented subject to such a reservation; and (3) coalbed gas is disposable under sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976), the oil and gas leasing provision.

I. *Ownership of Coalbed Gas*

Coalbed methane is both scientifically defined[7] and legally regarded[8] as a gas.[9] The relationship of coalbed

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[7] A. Kim, *Estimating Methane Content of Bituminous Coalbeds*, *supra* note 2.

[8] Several courts, addressing the question of what constitutes "gas" or "natural gas," have defined those terms to comprehend coalbed methane. *See, e.g., McCoy* v. *United Gas Public Service Co.*, 57 F. Supp. 444, 445 (W.D. La. 1932) (gas "consists of invisible vapors which are produced from the earth, containing varying amounts of hydrocarbon"). *See also Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 715 (10th Cir. 1971), *aff'g* 292 F. Supp. 619 D. Kan. 1968), where the court held that a grant of "oil and gas" included not only the hydrocarbon gases (such as methane) but also the helium extracted with them. The court approved the trial court's definition of gas as "any naturally-formed aeriform substance indigenous in the underlying reservoir * * *." 441 F.2d at 711, *citing* 292 F. Supp. at 686.

[9] By contrast coal is defined as: "[a] solid brittle, more or less distinctly stratified, combustible carbonaceous rock, formed by partial to complete decomposition of vegetation; not fusible without decomposition and very insoluble. The boundary line between peat and coal is hazy * * * as is the boundary line between coal and graphite and the boundary line between carbonaceous rock and coal." U.S. Bureau of Mines, *A Dictionary of Mining Mineral and Related Terms* 222 (1968).

methane to coal is described in a Bureau of Mines Report:

> Methane is always present in coal * * *. It occurs admixed with other hydrocarbons, CO2 N2 O2, H2 and He. It is a normal byproduct of the coal-forming process. Although much of the gas formed during coalification migrates away from the coal, a significant portion is retained in the coal and adjacent rocks. Some free gas is present in cracks and fractures, but most is adsorbed on the internal surface of micropores within the coal. The amount of gas that the coal contains depends primarily upon pressure, temperature, adsorptive capacity, and moisture content of the coal.[10]

Thus, although coalbed gas exists in coal deposits,[11] the two resources are distinct, and are potentially severable. In order to determine the ownership of coalbed gas in federal mineral deposits, it is necessary first to examine the various statutes in which rights to mineral deposits have been reserved to the Federal Government.

A. *Coal Land Withdrawals and Coal Reservations*

Beginning in 1906, President Roosevelt withdrew over 75 million acres of western land containing known "workable coal" from all forms of entry (i.e. homestead, agriculture). The purpose of these withdrawals was to prevent the continued loss, by the United States, of lands valuable for coal. However, by February of 1909, there were 11,688 original homestead and desert land entries

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10 A. Kim, *Estimating Methane Content of Bituminous Coalbeds*, *supra* note 2.

11 *See* Deul, *Methane Drainage from Coal Beds, A Program of Applied Research*, 60 Rocky Mtn. Coal Mining Inst. 13 (1964), describing coal as a "porous * * * solid with two distinct pore systems * * * [in which] gas can exist as free gas in cracks and fractures (macropores) or be adsorbed on the internal surface of the micropores."

of record in lands which had been withdrawn as valuable for coal, and the issuance of final certificates on 2,771 homestead and desert land entries had been suspended pending classification of the lands for coal. H.R. Rep. No. 2019, 60th Cong., 2d Sess. 2, 5-7 (Feb. 2, 1909).

Congress, spurred by the desire to re-open these lands to entry, passed the Act of Mar. 3, 1909, 30 U.S.C. § 81 (1976), and the Act of June 22, 1910, 30 U.S.C. §§ 83-85 (1976). The Act of 1909 provided relief for entrymen who in good faith had occupied lands for agricultural purposes and then, before patent, suffered withdrawal of that land from entry on the basis that it was coal land. The 1909 Act allowed the entryman to perfect his entry, but he received a patent reserving to the United States "all coal * * * and the right to prospect for, mine, and remove the * * * coal deposits." 30 U.S.C. § 81 (1976).

The 1910 Act provided alternate relief by opening withdrawn coal lands to agricultural entry subject to a reservation to the United States of "all the coal in the lands so patented, together with the right to prospect for, mine, and remove the * * * coal deposits." 30 U.S.C. § 85 (1976).[12]

It is a well-established principle that nothing passes in a public land grant by implication and that such grants should be interpreted in favor of the government. *Andrus* v. *Charlestone Stone Porducts Co.*, 436 U.S. 604, 617 (1978). However, public land grants "'are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication * * *.'" *Leo Sheep Co.* v. *United States*,

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12 By the Act of Apr. 23, 1912, 30 U.S.C. § 77 (1976), Congress allowed entry under the homestead laws on unreserved public lands in Alabama containing coal deposits, subject to the provisions of the 1910 Act, 30 U.S.C. §§ 83-85 (1976). The 1912 Act incorporates sec. 3 of the 1910 Act by reference. *See* 1 American Law of Mining §§ 2.17 and 3.24B (1960).

440 U.S. 668, 682-83 (1979), *quoting United States* v. *Denver & Rio Grande R. Co.*, 150 U.S. 1, 14 (1893). When coal was reserved by the United States under the 1909 and 1910 Acts, coalbed gas was viewed not as a valuable resource, but as a nuisance, and an acknowledgement of its hazardous qualities is found in the legislative history of the Act of June 22, 1910. 45 Cong. Rec. Appendix 156 (Speech of Rep. John K. Tenner (May 10, 1910)). Although there was no affirmative Congressional policy enunciated toward the disposition or ownership of coalbed gas, it is apparent from the legislative history of both the 1909 and 1910 Acts that Congress was aware of the narrow scope of the proposed reservation of "coal." Explaining the effect of H.R. 24834,[13] Honorable F. W. Mondell, Chairman of the House Committee on Public Lands, engaged in the following colloquy:

> Mr. STEPHENS of Texas. Is it not a fact that valuable minerals are reserved now to the Government?
>
> Mr. MONDELL. No; that is not true. The patent having issued, the patent carries everything in the land with it. * * *
>
> Mr. STEPHENS of Texas. That applies also to oil and coal?
>
> Mr. MONDELL. It applies to all kinds of minerals. In other words, the patents issued by the Government of the United States heretofore have been patents in fee.
>
> Mr. STEPHENS of Texas. *Could the gentleman better arrive at what he desires by only patenting the surface of the land and reserving all minerals, precious and otherwise?*

[13] H.R. 24834, with amendments not relevant to this discussion, was enacted as the Act of Mar. 3, 1909, 30 U.S.C. § 81 (1976).

> Mr. MONDELL. That has been discussed at some length, and the Committee on Public Lands is not of the opinion that that ought to be done. *We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some coals of value.*
>
> Mr. STEPHENS of Texas. Is not this a step in that direction of issuing limited patents?
>
> Mr. MONDELL. It is; and I trust it is as far as we will go in that direction.

43 Cong. Rec. 2504 (1909) (italics added).

Similarly, during debate on the 1910 legislation, Representative Mondell emphasized that the proposed legislation reserved to the Federal Government only the coal, and not other minerals, such as gas and oil.[14]

See 45 Cong. Rec. 6044 (1910). The statutory language and the legislative history belie the argument that Congress intended to reserve any mineral other than coal in the 1909 and 1910 Acts.

The conclusion that Congress in the 1909 and 1910 Acts reserved only coal, and not other minerals found in association with coal, is supported by the Act of Aug. 11, 1955, 30 U.S.C. § 541 (1976). This Act, known as the Uraniferous Legnite Act, authorized the location of mining claims and the removal of uranium-bearing lignite from the public lands classified as coal lands, and from entered, granted, or patented lands in which the coal deposits were reserved to the United States.[15]

[14] Secretary of the Interior Ballinger, commenting on the proposed 1910 legislation, observed that it "relate[s] only to lands which have been classified as, or are known to be, valuable for coal. In my judgment it would be well to extend its provisions to lands containing oil and natural gas." H. R. Rep. No. 377, 61st Cong., 2nd Sess. 4 (1910).

[15] The Multiple Mineral Development Act of 1954, 30 U.S.C. § 521 *et seq.* (1976), opened public lands known to be valuable for leasable

The intent of the law was to permit development of newly-discovered uranium-bearing lignite seams in federally-owned coal deposits, including coal reserved under the 1909 and 1910 Acts.[16] The uranium contained in the coal was a locatable mineral under the mining laws, and the locator of a uranium claim had "an absolute right to mine and remove [it]." H.R. Rep. No. 1478, 84th Cong., 1st Sess. 4 (1955). However, it was impossible to remove the uranium without removing the federally-owned lignite. Congress acknowledged that the entryman of land in which coal deposits were reserved to the United States has "*fee simple title to all other minerals in the land*, including valuable source materials [uranium], *regardless of the host material or the mode of occurrence*." *Id.* at 5. (italics added). Accordingly, sec. 4 of the Act provides the entryman of such lands with the right to "mine, remove, and dispose of lignite containing [uranium] and lignite necessary to be stripped or mined in the recovery of [the uranium] * * *." 30 U.S.C. § 541c (1976).

To Congress in 1955, then, the title of an entryman under the 1909 and 1910 Acts to all minerals in his land other than federally reserved lignite was not in dispute. The Uraniferous Lignite Act was both a recognition of this ownership, and a partial solution[17] to the problems

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minerals (*e.g.* coal) to location and patent of mining claims for locatable minerals (*e.g.* uranium). However, the 1954 Act did not provide for the location and extraction of a locatable mineral (uranium) occurring within a deposit of a Leasing Act Mineral (coal).

[16] *See* 101 Cong. Rec. 12300, 84th Cong., 1st Sess. (1955).

[17] Congress chose not to resolve such conflicts between surface entrymen and their grantees or lessees and federal coal lessees:

"Secs. 4 and 5 of the bill take cognizance of conflicting interests between the *entryman or owner [of entered, granted, or patented lands] who has title to any valuable source material contained in lignite* occurring in his lands and the lessee who has acquired the right to mine and dispose of such lignite through a lease agreement

of extracting and disposing of uranium occurring in direct association with federal lignite.

Our conclusion is further supported by the background to and enactment of the Act of Mar. 4, 1933, 30 U.S.C. § 124 (1976), in which Congress confronted the related problem of commingled deposits of potash and sodium. The Act of July 17, 1914, 30 U.S.C. § 121-123 (1976) (discussed further in part IB *infra*), authorized agricultural entries on lands withdrawn for potash, reserving to the United States the potash deposits. However, in New Mexico, valuable deposits of potash occurred in association with valuable sodium, a leasable mineral under the Mineral Leasing Act. Despite the Mineral Leasing Act's authorization of leases for sodium "and other related products," 30 U.S.C. § 262 (1976), and for potash "and other related products," 30 U.S.C. § 282 (1976), the Department took the position that the reserved potash in New Mexico and the sodium associated with it were not disposable under a single lease. Where patents had been issued under the 1914 Act reserving the potash, the surface owner had title to the sodium, "thus creating a *dual ownership of the same deposit* made up of both potash and sodium." H.R. Rep. No. 1938, 72nd Cong., 2d Sess. 2 (1933) (views of the Department of the Interior) (italics added). In response to this situation, Congress provide for agricultural entry on lands withdrawn or classified as valuable for sodium and/or sulphur, thereby consolidating in the United States for all future entries the mineral ownership for such commingled leasable deposits, 30 U.S.C. § 124 (1976).

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with the United States which reserved the coal in such lands at the time the lands were entered, granted, or patented.

"The committee feels that such conflict of interests should be resolved by the parties concerned or, failing that, by the local courts and not through legislation." H.R. Rep. No. 1478, 84th Cong., 1st Sess. 5 (1955). (italics added.)

A recent trial court decision,[18] based on common law principles, concluded that coalbed gas was not conveyed in a grant of "coal," and that the seller retained control over the gas, except for the right of the coal owner to vent it in the course of mining. The court cautioned, however, that the coalbed gas could not be extracted in any manner which would violate or diminish the property value of the coal. While the case is not controlling on the issue of ownership of coalbed gas in coal deposits reserved to the Federal Government in a federal land grant, the discussion of common law principles applicable to those private transactions lends further support to the conclusion that coalbed gas was not reserved with federal coal in nonmineral patents issued subject to the 1909 and 1910 Acts.

B. Reservation of Oil and Gas

Aside from coal lands, Congress continued the general policy of unity of surface and mineral estates in the disposition of public lands until 1914. By the Act of July 17, 1914, 30 U.S.C. §§ 121-123 (1976), Congress permitted nonmineral entry of lands withdrawn or classified as valuable for certain minerals including phosphate, nitrate, potash, oil and gas, reserving to the United States any and all of those minerals for which the lands were withdrawn or classified as valuable. As it had done in the 1910 Act for coal, Congress provided that patents issued under the 1914 Act "*contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same.*" (italics added.) 30 U.S.C. § 121 (1976).

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[18] *United States Steel Corp.* v. *Hoge*, No. 78-682 (Pa. Ct. C. P., Greene County, Mar. 24, 1980), *appeal filed*, Oct. 22, 1980.

As it had done in the 1909 and 1910 statutes, Congress reserved *only* the minerals identified in the 1914 Act, allowing all other minerals in the affected lands to pass with the surface. Again, the legislative history is instructive of Congress' view of the scope of the reservation:

> Mr. MANN. [*w*]*hy should not the Government serve all of the minerals under the surface?* * * *
>
> Mr. MONDELL. [*t*]*he gentleman's suggestion relates to a general mineral reservation. Of course that is not what this bill provides.* * * * The moment you depart from *the kind of reservation that we have heretofore provided for in the case of coal, and which we are now extending to these other minerals* * * * you must logically go to the extreme of withholding all minerals. * * * Of course it is barely possible that *some other minerals might some time be found* than those for which the land is withdrawn, but it is not at all likely, and if in the far distant future some minerals should be found in the possession of farmers and others, I do not believe any public interest would be injured thereby.

51 Cong. Rec. 10493-94, 63rd Cong., 2nd Sess. (1914) (italics added). Thus, Rep. Mondell, the Chairman of the House Committee on Public Lands, expressly acknowledged that the 1914 Act's mineral reservations, like the prior coal reservations, were specific, and were limited to the named minerals.

If any coal rights passed into private ownership under an agricultural entry subject to the 1914 Act with a reservation to the United States of "gas," then the gas and the right "to prospect for, mine and remove the same," including coalbed gas, is reserved to the United States where the lands were withdrawn or classified as oil and gas lands, or were reported as valuable for oil and gas deposits. *Cf. Brennan* v. *Udall*, 251 F. Supp. 12, 25 (D. Colo. 1996),

aff'd, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967) ("oil" reservation in the 1914 Act is generic and includes oil shale).

Like "oil," "gas" is a term of art, and the courts have interpreted gas broadly to include both fuel and non-fuel gases. *See* cases cited at note 8, *supra*. Therefore, should coalbed gas occur in the lands in which "oil and gas" were reserved to the United States under the 1914 Act, that coalbed gas would be retained under the Act.

II. Coalbed Gas is Leasable Under the Gas Leasing Provisions of the Mineral Leasing Act.

A. *Coalbed Gas is a "Gas" within the Meaning of the MLA and Applicable Regulations*

Sec. 1 of the MLA, *as amended*, 30 U.S.C. § 181 (1976), provides that:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this chapter * * *.

The MLA neither distinguishes coalbed gas nor provides any difinition of "gas" or "natural gas."[19] Thus, there is a definitional question raised by the MLA relating to the treatment of coalbed gas, similar to the question raised in the statutory reservations of 1909, 1910, and 1914.[20] The Mineral Leasing Act refers only to "gas" or

[19] Since the MLA uses "gas" in conjunction with "oil" and other fuels, the doctrine of *ejusdem generis* could arguably lead to a reading of the term restricted to hydrocarbon gas suitable for fuel. Since methane, the major component of coalbed gas, is a hydrocarbon gas suitable for fuel, even this restrictive interpretation would include coalbed gas.

[20] Based on a broad definition of "gas," and on the general intent of Congress to retain named mineral resources, this office has

"natural gas" without any qualifying adjectives, thus supporting a nonrestrictive reading of both terms.[21]

The legislative history of the MLA sheds little light on this subject. However, the regulations implementing the oil and gas leasing provisions of the MLA refer, and have uniformly over the life of the MLA referred to gas in general terms, leaving little doubt that coalbed gas is included in the meaning of the term "gas." Even where certain differences appear between coalbed gas and other mixtures or forms of hydrocarbon gas, the regulations, like the statute, do not distinguish them.

In Part 221 of the oil and gas operating regulations, gas is defined as "[a]ny fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarified state

expressed the opinion that carbon dioxide gas is included in the reservation of oil and gas in a land patent under the Act of July 17, 1914, 30 U.S.C. § 121 (1976). "Reservation of Carbon Dioxide Gas in Land Patent," Memorandum to the Colorado State Director, BLM, from the Regional Solicitor, Denver (July 12, 1979).

[21] The only apparent restrictive definition of gas appears in the Geothermal Steam Act of 1970, 30 U.S.C. § 1001 *et seq.* (1976). Sec. 27 of the Geothermal Steam Act, 30 U.S.C. § 1025 (1976) provides that in the leasing of geothermal resources, "[t]he United States reserves the ownership of and the right to extract * * * oil, *hydrocarbon gas*, and helium from all geothermal steam and associated geothermal resources produced from lands leased under this chapter in accordance with presently applicable laws * * *." (Italics added.)

Even if a limited definition of gas was intended, coalbed gas would still qualify as a reserverd gas under the Geothermal Steam Act. Since steam is commonly referred to as a gas, Congress probably limited the definition in this statute only to avoid confusion about which substances found in association with geothermal resources are properly extracted and exploited under a geothermal resource lease. In any event, this usage does not alter the use of the term "gas" in the Mineral Leasing Act, in the instant context.

at ordinary temperature and pressure conditions."[22] 30 C.F.R. § 221.2(o).

While the regulations acknowledge that gas comes from various fields and deposits at varying pressures, they do not distinguish between types of gases based on pressure or formations. Coalbed gas often comes from the wellhead at pressures below those of gas found in oil-bearing formations, but variances in pressure make no difference in the legal and regulatory treatment of the disposition of the gas. 30 CFR 221.44 provides that:

> *Gas of all kinds* * * * is subject to royalty, and all gas shall be measured by meter * * *. For computing the volume of all gas produced * * * the standard of pressure shall be ten ounces above an atmospheric pressure of 14.4 pounds * * *. All measurements of gas shall be adjusted by computation to these standards regardless of the pressure * * * at which the gas was actually measured. (italics added.)

Under this regulation, therefore, the volume of gas sold or produced is determined by a standard which disregards differences in wellhead pressure.

The only type of gas specifically mentioned in the MLA—helium—is also the only wellhead constituent of gas that Congress has deemed separable and reserved for specific governmental purposes.[23] Even helium, a nonhydrocarbon, is within the meaning of "gas" as used in the MLA, or else it would not have been necessary ex-

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22 This definition is unchanged since its adoption in 1942, 7 Fed. Reg. 4133 (1942). As noted at note 20, *supra*, this office has read this definition to encompass carbon dioxide gas.

23 Sec. 1 of the MLA, 30 U.S.C. § 181 (1976), provides: "[t]he United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provisions of this chapter."

pressly to exclude the right to extract helium under federal oil and gas leases.[24]

The meaning of gas in the MLA, therefore, has the same scope as that established for oil in *Brennan* v. *Udall, supra* and for gas under private lease in *Northern Natural Gas Co.* v. *Grounds, supra*—gas is to be defined broadly.

B. *Coalbed Gas is not Included in a Coal Lease under the MLA*

The Mineral Leasing Act provides distinct leasing requirements for coal and for gas. Gas deposits are leasable under sec. 17 of the MLA, 30 U.S.C. § 226 (1976), while coal leasing is covered in sec. 2, *as amended*, 30 U.S.C. § 201 (Supp. II 1978). Departmental regulations likewise contain distinct provisions for leasing and mining the two resources. Coal is governed by regulations at 43 CFR Part 3400 and CFR Part 211, while gas is covered by regulations at 43 CFR Part 3100 and 30 CFR Part 221.

From a resource recovery standpoint, coalbed gas is extractable during or in advance of the mining of underground coal by techniques very similar to those for recovering other commercial gases. Currently, coalbed gas may be drained from coalbeds in either of two ways, both involving vertical wells connected to horizontal holes or cracks in the coal that encourage passage of the gas to

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24 The Department has interpreted the helium reservation consistently with this conclusion. Sec. 1 of the current federal oil and gas lease form, Form 3110-2 (1977), gives the oil and gas lessee the "exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased. * * *" The form thus includes all types of gas—even nonhydrocarbon gases such as helium—within the meaning of "gas deposits." Except for the language excluding helium, this section of the lease form has remained essentially unchanged since its adoption in 1920. 47 L.D. 437, 447 (1920).

the well.[25] Because it is recoverable by gas recovery methods, coalbed gas is easily regulable as a gas.

Moreover, the coal leasing provisions of the MLA do not appear to provide for recovery of anything other than coal.[26] Nothing in existing coal leases or in the current coal lease form authorizes commercial extraction of coalbed gas or provides for the assessment of a royalty for its recovery. The fact that the Mineral Leasing Act includes rights to related minerals in the grant of rights under certain specific leases (other than coal) indicates an intention *not* to lease related minerals along with coal. The sodium, phosphate, and oil shale leasing sections of the MLA allow or require a lessee to extract certain minerals related to, or co-existing with, the principal leased mineral. The sodium leasing provisions in secs. 23 and 24 of the MLA, 30 U.S.C. §§ 261-262 (1976), authorize the Secretary to lease "chlorides, [etc.] of sodium," and require him to collect royalties on "sodium compounds and other related products." Similarly, 30 U.S.C. §§ 281-82 (1976) authorize the leasing of potassium, and require royalty collection on "potassium compounds and other related products." Sec. 9 of the MLA, 30 U.S.C.

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[25] According to one study, a single coalbed well can drain between 20 and 30 acres. M. Deul, A. Kim, *Coal Beds: A Source of Natural Gas*, The Oil and Gas Journal 49 (June 16, 1979). However, one method of extraction, hydraulic stimulation, reportedly has the potential of creating a safety hazard to coal mining by causing harm to the coal seam and the roof strata overlying the coal. *See United States Steel Corp.* v. *Hoge, supra*, slip op. at 7-12.

[26] Sec. 2 of the MLA, 30 U.S.C. § 201 (Supp. II 1978), authorizes leases granting the right to extract coal, and in 1920 required royalty payments on a per ton basis. Such a lease scheme was clearly not designed by Congress to encompass beneficial extraction of coalbed gas. Sec. 8A, 30 U.S.C. § 208-1(a), authorizes government exploration for "coal resources" recoverable by deep or surface mining methods. Other references to "deposits of coal" and "coal-field[s]" indicate that the statute's coal provisions do not contemplate gas extraction. 30 U.S.C. §§ 201(a), 208-1 (Supp. II 1978).

§ 211 (1976), authorizes the Secretary to lease and collect royalty on phosphate deposits "including associated and related minerals." The oil shale leasing provisions in sec. 21(a) of the MLA, 30 U.S.C. § 241(a) (1976), provide that "deposits" of oil shale are subject to lease, and that royalties are required "[f]or the privilege of mining, extracting, and disposing of oil *or other minerals* covered by a lease under this section. * * *" (italics added).

Congress inclusion of associated and related mineral products in these sections of the MLA stands in clear contrast to the absence of such language in the coal leasing provisions.[27] Indeed, the present coal leasing system appears only to grant the federal coal lessee the right to vent the gas for safety purposes.[28] Federal Coal Mine Health and Safety Act of 1977, 30 U.S.C. §§ 863, 877(h) (Supp. II 1978). *Cf. United States Steel Corp.* v. *Hoge, supra.* Analysis of the Mineral Leasing Act's provisions for leasing coal and oil and gas shows that a lease for "coal" does not include the right to extract gas, including methane,[29] and that coalbed gas is subject to disposition

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[27] As discussed in part IA, *supra*, even though the leasing provisions for both potash and sodium authorized leasing "other related products," 30 U.S.C. §§ 262, 282 (1976), when those two minerals had not been *reserved* together, the Department took the position that potash and associated sodium were not disposable under a single lease for potash. It is clear, then, that the coal leasing provision of the MLA, 30 U.S.C. § 201 (Supp. II 1978), which does not encompass "related" or "associated" minerals, does not authorize extraction of coalbed gas under a coal lease.

[28] The coal miner's expulsion of coalbed gas from mine tunnels is an exercise of an obligation distinct from the right of capture or ownership. The obligation to remove methane through ventilation or drainage is a safety precaution without which coal would not be mineable. See *Op. Att'y Gen.* No. 53, at 3-4 (Pa. 1974).

[29] While courts have held in cases involving private leases that a lease of "coal and other minerals" may include the right to extract oil and gas deposits, where only coal is granted (*i.e.*, not "coal and other minerals") the courts do not strain definitions to include other minerals. *E.g. Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. 286, 25

as a gas under Sec. 17 of the MLA, 30 U.S.C. § 226 (1976).

Several companies holding federal oil and gas leases have inquired whether coalbed gas is covered by their leases, and have filed applications to drill for coalbed gas. Since existing oil and gas leases do not specifically reserve coalbed gas from the granting clause, it must be considered as leased. *See, e.g.*, Noncompetitive Oil and Gas Lease Form 3110-1 (March 1977). Sec. 2(d) of this form authorizes the Secretary to set minimum values for royalty computation purposes "on *any or all* oil, *gas*, natural gasoline, and other products obtained from gas," (italics added) and sec. 2(j) requires the lessee "[t]o exercise reasonable diligence in drilling and producing, * * * having due regard for the prevention of waste of oil or gas. * * * "

It must be noted that an oil and gas lessee does not have a license to develop the coalbed gas resource in any manner. The lease and Departmental regulations prohibit damage to coal or other mineral deposits. *See* Noncompetitive Oil and Gas Lease Form 3110-1, § 2j; Coal Lease Form 3130-1, § 3(e); and 30 CFR § 221.9. Should the lessee propose any drilling which would in the judgment of the Geological Survey cause damage to the coal deposit or create a safety hazard for subsequent coal mining, the application to drill may be denied. If there is an outstanding coal lease, the Department's authority to grant the gas drilling permit is restricted by the rights previously granted to the coal lessee. *Cf. United States Steel Corp.* v. *Hoge, supra*, (surface owner with gas reservation may not infringe upon coal owner's estate to recover

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A. 597 (1893). The court discussed the extent of the coal lease, concluding that "the grantee of the coal owns the coal but nothing else, save the right of access to it and the right to take it away." *Id.* at 296, 25 A. at 598-99. *See also, Op. Att'y Gen.* No. 53, *supra*, note 28, concluding that a coal lease does not convey the coalbed gas in the deposit.

coalbed gas beyond normal oil and gas recovery techniques).

III. *Conclusion*

Since Congress has never specifically addressed the question of whether the right to extract coalbed gas is part of a coal lease or part of an oil and gas lease, the question of coalbed gas ownership must be resolved by construction of the statutes which provide for the reservation of resources to the United States, and which authorize the leasing of those resources. This analysis leads to the conclusions: (1) that a reservation of "coal" does not include coalbed gas; and (2) that a reservation of "gas" encompasses coalbed gas. Furthermore, in our opinion, coalbed gas is disposable as a gas under sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976). However, nothing in this opinion warrants title to any oil and gas deposit nor detracts from any coal lessee's obligation to comply with the coalbed gas ventilation provisions of the Mine Health and Safety laws.

We are prepared to render any further advice you may deem appropriate regarding legal issues raised by the potential conflict between an oil and gas lessee and a coal lessee or by the possibility that coalbed gas development could harm or preclude subsequent recovery of the coal.

WILLIAM H. COLDIRON
Solicitor

APPENDIX G

DECISION OF THE DEPARTMENT OF THE INTERIOR

RIGHTS TO COALBED METHANE UNDER AN OIL & GAS LEASE FOR LANDS IN THE JICARILLA APACHE RESERVATION*

M-36970 *October 16, 1990*

Indians: Mineral Resources: Oil and Gas: Generally

Under Bureau of Indian Affairs Lease Form 5-157 (1947), paragraphs 1 and 10, the term "natural gas" unambigously includes coalbed methane.

Under Bureau of Indian Affairs Lease Form 5-157 (1947), paragraphs 1 and 10, the word "deposit" does not exclude methane found in coal from oil and gas deposits.

Indians: Reservations: Generally

Where the general intent to lease all gases is clear, the absence of specific intent to include coalbed methane as a gas in Bureau of Indian Affairs Lease Form 5-157 (1947), cannot create a reservation of that gas.

Indians: Mineral Resources: Oil and Gas: Generally

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

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* Not in chronological order.

To: Secretary

From: Solicitor

Subject: Rights to Coalbed Methane Under an Oil and Gas Lease for Lands in the Jicarilla Apache Reservation

The Area Director of the Albuquerque Area Office, Bureau of Indian Affairs (BIA), has requested this Office's opinion on whether an oil and gas lease, between the Jicarilla Apache Tribal Council and Mobil Producing Texas & New Mexico Inc. (Mobil), authorizes Mobil to produce natural gas from coal seams deposited in the Fruitland Formation in New Mexico. Such gas is often referred to as "coalbed methane." Having reviewed the terms of the lease, we find that the lease unambiguously granted Mobil the right to produce any coalbed methane found within the lease.

BACKGROUND AND ISSUES

The March 7, 1902, lease between the Jicarilla Apache tribe and the Magnolia Petroleum Co. (predecessor to Mobil) employs the November 1947 version of the BIA's lease Form 5-157.[1] Like most oil and gas leases, the

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[1] The land subject to the lease is within the reservation set aside for the Jicarilla Apache Tribe. The reservation was established in 1887 by Executive Order. 1 C. Kappler, *Indian Affairs, Laws and Treaties* 875 (1904).

Oil and gas leasing on executive order reservations was first authorized by the Indian Oil Act of 1927, 25 U.S.C. § 398a. *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1709-10 (1989). The 1927 Act permitted the leasing of unallotted lands within an executive order reservation "for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title." 25 U.S.C. § 398a. Sec. 398, enacted in 1924, permitted the Secretary to lease certain unallotted land on reservations "for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities * * *" provided the Secretary had the "consent of the council speaking for such Indians."

These statutes were needed to authorize oil and gas leasing of these lands after Attorney General (and later Chief Justice) Stone

basic economics of this lease are that the Jicarillas received a bonus and receive royalties on production; the lessee received the rights to explore for and produce the oil and gas. More specifically, the Jicarillas received a bonus of $54,330 and "a royalty of 12½ percent of the value or amount of all oil, *gas*, and/or natural gasoline, and/or all other hydrocarbon substances produced and

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determined that Interior could not lease minerals on executive order reservations under the Mineral Leasing Act of 1920. 34 Op. Atty. Gen. 171 (1924), *rejecting E. M. Harrison*, 49 L.D. 139 (1922). *See* S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937).

The Indian Oil Act was revised by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, the authority under which the lease in question was issued. The 1938 Act authorizes the Secretary to approve the issuance of leases "for mining purposes * * * for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a. More specifically, it requires that "leases for oil- and/or gas-mining purposes" are to be offered to the highest responsible bidder, at public auction or on sealed bids, "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." 25 U.S.C. § 396b. Sec. 7 of the Indian Mineral Leasing Act of 1938 repealed "all Acts or Parts of Acts inconsistent herewith * * *" 52 Stat. 347 (1938).

It is beyond question that the Secretary had the authority to approve under the 1938 Act a lease which granted rights to coalbed methane as a part of the rights to oil and gas. Under "[t]he Indian Mineral Leasing Act of 1938, * * * [t]he Secretary is delegated the authority to define the terms of the leases and to 'make such rules and regulations as may be necessary for the purpose of carrying the provisions of [the] section into full force and effect * * *" *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir. 1990).

In granting the Secretary and the Tribes broad discretion to fashion the terms of the leases, Congress followed the pattern it established when it enacted the first law authorizing mineral leasing on Indian lands, the Act of February 28, 1891. 25 U.S.C. § 397. That law authorized the leasing of "lands * * * occupied by Indians who have bought and paid for the same, * * * for a period not to exceed * * * ten years for mining purposes in such quantities and *upon such terms and conditions as the agent in charge of such reservation may recommend*, subject to the approval of the Secretary of the Interior." (Italics added). *See Cotton Petroleum Corp., supra* at 1709.

saved from the land leased herein." Lease Form 5-157 ¶ 3(c) (italics added). The lessee received the "exclusive right * * * to drill for, mine, extract, remove and dispose of all the oil and natural *gas* deposits" in Tract 178; that right was granted for "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or *gas* is produced in paying quantities from said land." Lease Form 5-157 ¶ 1 (italics added). Lease Form 5-157 specifically defines what the word "gas" was intended to mean: paragraph 10 provides that "[i]t is covenanted and agreed that helium gas, carbon dioxide gas, and *all other natural gases* are included under the term 'gas' as used in this lease * * *." (Italics added).

Broadly speaking, our inquiry here is whether this lease may be reasonably construed to *exclude* from the grant of rights to Mobil the right to produce natural gas found in coalbeds within its lease. For if that interpretation is reasonable, and if it better promotes the Tribe's interests than another interpretation would, then we are obliged to adopt it. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., dissenting in part), *adopted as majority opinion en banc*, 782 F.2d 855 (1986), *supplemented en banc*, 793 F.2d 1171 (1986), *cert. denied* 479 U.S. 970 (1986). However, for our obligation under *Jicarilla* to arise, there must be an ambiguity sufficient to permit more than one reasonable interpretation; for "the canon of construction regarding the resolution of ambiguities [in favor of a tribe] * * * does not permit reliance on ambiguities that do not exist * * *," *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986), and the Department is not "compelled to go contrary to and beyond the regulations and the leases" in fulfilling its obligation to the tribe. *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987), *cert. denied* 486 U.S. 1032 (1988).

In Solicitor's Opinion, M-36935, 88 I.D. 538 (1981), this Office concluded (among other things) that coalbed methane was a gas leasable under the provisions of the Mineral Leasing Act governing "oil and gas deposits." 30 U.S.C. § 226(a). Here we will consider three similar questions. First is whether coalbed methane is a "natural gas" within the meaning of ¶ 10 of the lease. We conclude that it is. Second is whether by agreeing that Mobil would receive rights to "oil and gas *deposits*," as opposed to "oil and gas," the parties intended to exclude natural gas found in coalbeds. We conclude the parties did not so intend. Third is whether the lease would be rendered ambiguous if it could be shown that the parties did not specifically intend to grant rights to coalbed methane. We conclude it would not.

ANALYSIS

I. Coalbed Methane is a "Natural Gas" Found in "Oil and Gas Deposits" within the Meaning of the Lease

Paragraph 10 expressly includes within the meaning of "gas" "all other natural gases." Long before 1952 the Department and the minerals industries understood coalbed methane to be a gas. *See, e.g.*, N. H. Darton, *Ocurrence of Explosive Gases in Coal Mines* 12-16, 225-26 (1915) (Bureau of Mines Bulletin No. 72). As explained in Opinion M-36935, "Coalbed methane is both scientifically defined and legally regarded as a gas * * * [A]lthough coalbed gas exists in coal deposits, the two resources are distinct, and are potentially severable." 88 I.D. at 540 (footnotes omitted). The only case addressing this point since Opinion M-36935 was issued has reached the same conclusion. *See United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1382 (Pa. 1983) ("coal and coalbed gas are * * * separate physical entities"; coalbed gas contains same elements as other natural gas). We have found no definition of "natural gas" which would exclude coalbed methane. Paragraph 10 therefore includes coalbed methane as a "gas" covered by the lease.[2]

Nor is our analysis altered by the physical state methane may be in while in the coalbed. Technical analysis of coal in the San Juan Basin indicates that some coalbed methane exists in the "gaseous phase" just as methane exists in a sandstone or other reservior. But much of it is either adsorbed on or absorbed in the molecules of coal, and may be more accurately regarded as a condensed fluid, which becomes gaseous as the pressure in the coal bed is decreased. Kelso, Wicks, and Kuuskraa, *A Geologic Assessment of Natural Gas from Coal Seams in the Fruitland Formation, San Juan Basin* 45 (Gas Research Institute Topical Report 1988). But this phenomenon, where hydrocarbons change from a gas to a liquid or a liquid to a gas, is not a novelty in oil and gas leasing. Some hydrocarbons are gaseous when under pressure in the reservoir, but become liquids at atmospheric pressure: these are called condensate. Some, under a natural process called retrograde condensation, convert from gas to liquid while still in the reservoir, and at sufficiently low pressure may reconvert to gas. Still others become liquids when treated at a natural gas processing plant. Craft and Hawkins, *Applied Petroleum Reservoir Engineering* Chap. 2 (1959); Slider, *Practical Petroleum Reservoir Engineering Methods* Chap. 4 (1976); *Field Handling of Natural Gas* 26-27 (3rd ed. 1972) (Petroleum Ext. Serv., Univ. of Texas Austin). Yet all are "hydrocarbon substances" subject to royalty under ¶ 3(c) of Lease Form 5-157. *See generally Jicarilla Apache Tribe v. Supron Energy Corp., supra* (royalty due on both natural gas and liquid products). So, too, any methane which may be a con-

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[2] *Accord, Exxon Corp. v. Lujan*, 730 F.Supp. 1535, 1543-45 (D. Wyo. 1990), *appeal docketed* No. 90-8036 (10th Cir.) (carbon dioxide is a natural gas under sec. 28 of Mineral Leasing Act, relying in part on Solicitor's Opinion, M-36935).

densed fluid within the coalbed before production is a "hydrocarbon substance" subject to royalty.

Nor can we find that the word "deposit" was intended to exclude coalbed methane from the rights granted under the lease. "Deposit" has a common usage in the minerals industries. Its accepted meaning provides no basis to exclude methane found in coal from "oil and gas deposits." The Department's Bureau of Mines defines "deposit" as a term "used to designate a natural occurrence of a useful mineral * * * in sufficient extent and degree of concentration to invite exploration." *A Dictionary of Mining, Mineral and Related Terms* 313 (Bureau of Mines 1968). A "mineral deposit" is similarly defined as "a body of mineral matter in or on the Earth's surface which may be used for its industrial mineral or metal content." *Id.* at 710. In the oil and gas context, a "deposit" has been defined as "an accumulation of oil, gas or other minerals capable of production." Williams and Meyers, *Manual of Oil and Gas Terms* 146 (4th ed. 1976). All these definitions plainly include methane found in coalbeds as a "deposit" of gas, and none limit the term "deposit" by the structure or stratum in which it is found.[3]

On Federal lands, the Department has always used the phrase "oil and gas deposits" to refer to the full range of rights granted in an oil and gas lease. The phrase appeared in the first lease form implementing the Mineral Leasing Act of 1920, see 44 L.D. 447, 448 (1920), and has been used in subsequent forms.[4]

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[3] The word "deposit" had a similarly broad meaning in 1920, when Congress used it in the Mineral Leasing Act. *See* Fay, *A Glossary of the Mining and Mineral Industry* 211 (Dept. of the Interior 1920) ("the term mineral deposit or ore deposit, is arbitrarily used to designate a natural occurrence of a useful mineral or ore in sufficient extent and degree of concentration to invite exploitation").

[4] For example, for lease forms in use around the time this Jicarilla lease was executed, see Bureau of Land Management Form 4-213 (Dec. 1949), Form 4-213 (Feb. 1952), and Form 4-1097 (Jan. 1957).

Congress has used the phrase itself in that Act, authorizing the Secretary to lease lands "known or believed to contain oil or gas deposits." 30 U.S.C. § 226(a). This Office has previously indicated that grants of rights to oil and gas deposits include the rights to coalbed methane. 88 I.D. at 545-46. Given that there is no commonly used definition of "deposit" which supports a narrower view, we find no reasonable basis for construing the phrase "oil and gas deposits" differently when it appears in Indian leases, as opposed to Federal leases, on forms issued by this Department. *Accord, Navajo Tribe of Indians v. United States,* 364 F.2d 320, 324-27 (Ct.Cl. 1966) (phrase "oil and gas deposits" in Indian lease includes helium, even though helium is not a hydrocarbon gas).

We therefore find that paragraphs 1 and 10 of the lease unambiguously grant the right to produce coalbed methane.

II. Where the General Intent to Lease All Gas Is Clear, the Absence of Specific Intent to Include Coalbed Methane as a "Gas" Under This Lease Cannot Create a Reservation of That Gas

In cases interpreting whether an oil and gas lease grants rights to a certain kind of gas, it is common for a party to argue that it did not specifically intend to grant the right to that gas. In carrying out our trust responsibility to act in the best interest of the Tribe, we consider whether such an argument could be used to make what would otherwise appear to be clear language ambiguous. Two cases on ownership of coalbed methane have been decided since Opinion M-36935 was published. Neither provides a reasonable basis for relying on an absence of

"specific intent" to depart from the plain language of the lease.

The first case is an unreported decision of the Northern District of Alabama, Civ. No. 85-G-2261-W, affirmed without opinion by the Eleventh Circuit, *Rayburn v. USX Corp.*, 844 F.2d 796 (11th Cir. 1988). At issue was the language of a private warranty deed severing from the estate all minerals "except oil and gas." There the district court avoided deciding whether coalbed methane was a "gas" or whether it was a mineral severed from the estate. The district court also reviewed evidence of knowledge and usage of coalbed methane in the area at the time the deed was executed (slip op. pp. 2-4); but the court based its ruling solely "on the language of the deed in question." *Id.* at 4. The court determined that the two parties could not have intended for coalbed gas to be produced with other gas because the deed required that "all coal seams * * * penetrated in * * * [oil and gas] drilling operations shall be encased or grouted off." The district court stressed that its "decision * * * is not a declaration that in all instruments the interpretation will be the same." *Id.*

In the matter before us, we too base our interpretation on the language of the instrument, here the lease. That language, however, stands in contrast to the language of the deed in *Rayburn*. Here the lease does not require the oil and gas lessee to case off the coalbed, and instead requires the lessee to test the coalbearing Fruitland formation for gas production. "Special Stipulation A" required the lessee to drill a well within the first 5 years of the lease "to test thoroughly *all formations* down to and including the Point Lookout Sandstone." (Italics added). One of the formations above the Point Lookout Sandstone is the Fruitland Formation, in which the Fruitland

coalbeds were deposited.[5] Thus, under the stipulation, the lessee was obliged to test this formation to determine whether it could produce oil or gas in paying quantities. Given that the first coalbed methane well in the San Juan basin was completed in the Fruitland Formation just one year after this lease was executed,[6] it is difficult to argue that production of coalbed methane from this formation would be inconsistent with the terms of this lease.

The second case is a decision of the Supreme Court of Pennsylvania. Pennsylvania has adopted the rule that gas present in the coal belongs to the owner of the coal, but coalbed gas which has escaped into surrounding strata belong to the owner of those strata. *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983). *Hoge* concerned not a mineral lease, but a 1920 deed severing ownership of the coal from the other rights in the land. In the deed the grantor reserved the right "to drill and operate through said coal for oil and gas." The Pennsylvania Supreme Court's decision appears to have been powerfully influenced by its "strata" theory of ownership. Under that theory, "the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata."

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[5] Fassett, "Coal-bed Methane—A Contumacious, Free-Spirited Bride; the Geologic Handmaiden of Coal Beds," p. 139, fig. 10. Fassett, an employee of the U.S. Geological Survey, published this article in *Energy Frontiers in the Rockies* (Albuquerque Geological Society 1989).

[6] "What has come to be recognized as the most famous Fruitland coalbed methane well in the San Juan Basin, the Phillips Petroleum Company No. 6-17 San Juan 32-7 Unit well * * *, was completed in 1953 * * * The well was completed open-hole in a thick sequence of interbedded Fruitland coal beds, sandstones, siltstones, and mudstones, between 3055 and 3240 [feet] * * * with no stimulation." Fassett, *supra* at 142.

Where, as here, the coal may be interbedded with other gas-bearing strata, it could be unusually difficult to seal off the coal or to account separately for gas produced from the coal and non-coal strata.

Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893). Accordingly, anything found in the coal stratum would belong to the owner of the coal. *Hoge*, 468 A.2d at 1383-84. Additionally, the court considered "the conditions existing at the time of [the deed's] execution" in 1920. "[A]t the time this coal severance deed was entered into, although commercial exploitation of coalbed gas was known such operations were very limited and sporadic." *Id.* at 1384. Furthermore, although coalbed methane and other natural gases "are found in the same geographic areas of Pennsylvania," the record before the court showed that "the gas which has commonly been referred to as 'natural gas' is generally found in strata deeper than coal veins * * * " *Id.* at 1382. Therefore, the court concluded, "[a]lthough the unrestricted term 'gas' was used in the reservation clause, * * * we find it inconceivable that the parties intended a reservation of all types of gas." *Id.* at 1384-85.

> We find implicit in the reservation of the right to drill through the severed coal seam for "oil and gas" a recognition of the parties that the gas was that which was generally known to be commercially exploitable. It strains credulity to think that the grantor intended to reserve the right to extract a valueless waste product with the attendant potential responsibility for damages resulting from its dangerous nature. * * * We find more logical and reasonable the interpretation offered by the Appellant that the reservation intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal.

Id. at 1385.

Under *Hoge*, Pennsylvania courts need not inquire whether the parties to the deed specifically intended to convey coalbed methane. Instead they are to look at the "language of the deed * * * in its entirety, giving effect to all its terms and provisions, and construing the language in light of conditions existing at the time of its execution." *Id.* at 1384. In the matter before us, we are not dealing with language reserving or granting a "right to drill and operate through said coal for oil and gas" that may lie beneath. Instead, we have unambiguous language granting rights to all gas deposits and to all forms of natural gas.[7]

There are aspects of *Hoge*, however, which render its analysis inapplicable to our inquiry. Most important is its reliance on a "stratum theory" of ownership. This theory is inapplicable to leases issued under the Indian Mineral Leasing Act. Under that law, the Secretary is not authorized to approve grants of fee rights to the various strata underlying the reservation. Instead, he is authorized to approve leases for "mining purposes." 25 U.S.C. §§ 396a, 396b. The rights granted are not fee rights, like those granted by severance deeds in Pennsylvania, but instead are rights needed to fulfill the purpose of the lease. Thus, the Tribe's lessee does not own the shales, the sandstones, the coal, or any other formation in which natural gas may be found. But it does own the rights to extract all the oil and natural gas.

Of lesser importance, but still significant, is that the court's interpretation of the deed is partly based on the geology of Pennsylvania, where the "conventional" gas reservoirs reportedly lie deeper than the coal seams. But as explained above, the coal seams in the San Juan Basin are often interbedded with the conventional reservoirs. So the inferences the Court drew from "conditions existing" in Pennsylvania, 468 A.2d at 1384, are not useful in the matter before us.

Several other cases have addressed whether various gases occurring in nature are "gas," "natural gas," or "gas deposits." Though none deal with coalbed methane, the

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[7] Indeed, as noted above, in the lease for Tract 178 "Special Stipulation A" requires that the lessee drill through and test the formation in which the coalbed lies.

gases have adopted a broad definition of these phrases as including even non-hydrocarbon gases. *E.g., Navajo Tribe of Indians v. United States*, 364 F.2d 320, 327 (Ct.Cl. 1966) (as matter of law, term "gas" in Indian oil and gas lease includes helium); *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 714-15 (10th cir. 1971), *cert. denied*, 404 U.S. 951 (1971) (under State law, court looks to "general" intent of parties, grant of "gas" in lease includes helium).

On the question of the parties' specific intent with respect to coalbed methane, the *Navajo Tribe* case is the most instructive because it involves an Indian oil and gas lease. One of the issues there was whether a Navajo lease granting the rights to "all the oil and gas deposits" included the right to helium. The Tribe argued that "gas deposits" referred to hydrocarbon gases, that helium was not a hydrocarbon gas, and that the Government[8] had the burden of proving that the parties specifically intended for the lease to include helium. 364 F.2d at 325. The Tribe "point[ed] out that helium was not specifically mentioned in the 1923 lease and * * * that knowledge of helium was extremely limited during the period in question." *Id.*

The court rejected these arguments. The helium was found in reservoirs commingled with the hydrocarbon gases, and the two could not be separated before they were produced.[9]

> Perhaps, plaintiff [the Tribe] would impose upon the lessee an obligation to produce the gas, extract the helium and deliver the refined helium to the lessor.

[8] The United States had entered into an agreement with the Navajo and its lessee, under which the United States took control of the lease. 364 F.2d at 320, 324. The Tribe argued that the lease had not granted rights to the helium, and therefore claimed the Government had unlawfully produced and removed the helium.

[9] As indicated in note 6 above, this can also be true of coalbed methane and other natural gas when the coal seams are interbedded with other reservoir rocks.

> * * * However, the lease in question contains no such provisions, and there is no basis for holding that such an understanding arose by implication. * * * Although the parties to the lease may have been thinking mainly of fuel-type gases, it is still more realistic to presume that the grant included not only hydrocarbons but the other gaseous elements as well. * * * To summarize, plaintiff's "specific intent" theory must be rejected.

364 F.2d at 326-27.[10] The court recognized that ruling against the Tribe on this isue appeared "inconsistent with the notion that ambiguities in oil and gas leases are to be construed in favor of the lessor." *Id.* at 327. But the plaintiff's interpretation of the lease "would be in conflict with the general intent of the parties." *Id.*

Even if it could be shown that coalbed methane was not economically or technologically producible when this lease was issued in 1952, the circumstances would not appear germane to the proper interpretation of the lease. When the lease was signed, the parties knew that the lessee might discover a gas deposit (even of the "conventional" kind) which would not have enough gas to make production economically feasible at that time. But the lease did not limit the grant to those deposits of gas appearing economically producible in 1952. It granted rights to "all" deposits. In *Utilities Production Corp. v. Carter Oil Co.*, 2 F.Supp. 81 (N.D. Okla. 1933); *aff'd* 72 F.2d 655 (10th Cir. 1934), the court stated in relevant part:

[10] The court added that plaintiff probably would not prevail even under a specific intent theory. Although the evidence regarding the circumstances at the time of the signing of the 1923 lease is scant, there appears to be some merit in defendant's view that the existence of helium was generally known. Also, it is significant that the Department of the Interior acted for the tribe and certainly the Department was familiar with helium. 364 F.2d at 327. In the matter before us, the existence of methane in coal was generally known in 1952, and it is clear from Stipulation A in the lease for Tract 178 that the Department was very familiar with the geology of the San Juan basin.

> * * * improved methods of drilling and producing are necessary for the successful operation of the leases, and it was undoubtedly within the contemplation of the parties to the leases that improved and modern methods should be used for the production of oil from the lands which would be advantageous to both the lessor and the lessee. * * *

2 F.Supp. at 86. A lease takes into consideration improving methods of development.

Furthermore, in this respect there is a similarity between coalbed methane and geothermal steam. In *United States v. Union Oil Co. of California,* 549 F.2d 1271 (9th Cir. 1977), the court found that although the Stock-Raising Homestead Act of 1916 did not specify geothermal resources in its reservation of "coal and other minerals," the language in the Act was sufficient to "encompass geothermal resources." *Id.* at 1274. This was so even though Congress had given no thought to geothermal steam in 1916.

> There is no specific reference to geothermal steam and associated resources in the language of the Act or in its legislative history. The reason is evident. Although steam from underground sources was used to generate electricity at the Larderello Field in Italy as early as 1904, the commercial potential of this resource was not generally appreciated in this country for another half century. * * * Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to them.

Id. at 1273. But Congress's intent in the legislative history was "to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest." *Id.* at 1274. In addition to this general intent, the court

found that each of the elements of geothermal resources could be considered a mineral. *Id.* This case illustrates that a resource, not perceived as valuable when a reservation was originally made, could be found included in a reservation merely through the general language of the reservation. Thus, "geothermal resources" or "coalbed methane," though their value may not have been originally foreseen, can easily fall within the broader language of a lease grant or patent reservation.

Here, the general intent of the parties to include all natural gases is clear from the express terms of the lease. As the *Navajo Tribe* and *Union Oil* cases teach, it is irrelevant that the parties may not have specifically intended to include coalbed methane or that the resource was not economically recoverable when the lease was executed. This conclusion is consistent with the purpose of the Indian Mineral Leasing Act. As the Supreme Court has indicated, "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue." *Cotton Petroleum Corp. v. New Mexico, supra* at 1709. Coalbed methane produced under this lease will earn the Tribe royalties at the rate of 12½ percent of the value or amount of the production. Additionally, the production is subject to the Tribe's power to impose a severance tax. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982). The Tribe will therefore receive substantial revenues from coalbed methane produced under this lease.

III. The Lessee's Right to Produce the Coalbed Methane Is Subject to Regulation to Protect the Coal

As we indicated above, while the lessee here has the right to extract methane found in the coalbeds of the San Juan Basin, it does not have the right either to extract the coal or to cause unauthorized damage to the coal resources without compensating the Tribe. Coalbed gas extraction techniques may, in some cases, damage the coal seam and render the coal unminable or more expensive to mine,

thus discouraging future development. We therefore believe a few observations are in order concerning the lessee's duties with respect to the lessor's coal.

As the Department noted in Solicitor's Opinion M-36935,

> an oil and gas lessee does not have a license to develop the coalbed gas resource in any manner. * * * Should the lessee propose any drilling which would in the judgment of the Geological Survey cause damage to the coal deposit or create a safety hazard for subsequent coal mining, the application to drill may be denied. * * * We are prepared to render any further advice you may deem appropriate regarding legal issues raised by * * * the possibility that coalbed gas development could harm or preclude subsequent recovery of the coal.

88 I.D. at 549-50. The coal in the San Juan Basin within the Jicarilla reservation apparently is not currently regarded as a resource which can be mined economically. However, the economics of mining this coal may change to the Tribe's benefit in the years ahead; and the Department should have due regard for this possibility when reviewing an oil and gas lessees's application for permission to complete a well in the coalbed.

The statutes, regulations, lease provisions, and case law have put lessees on notice that the Department will take all necessary actions to protect tribal resources. The lease for Tract 178 contains several provisions concerning the protection of the Tribe's coal resources. For example, ¶ 3(f) requires the lessee "to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for * * * the preservation and conservation of the property for future productive operations * * *" That paragraph also requires the lessee to "carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property * * *"

Paragraph 8 provides the Department with broad authority to enforce those obligations:

> the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor * * *

Paragraph 3(g) commits the lessee to honor "any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases," other than rules concerning the royalty rate or annual rental. The "Forest and Land Protection Stipulations" attached to this lease further protect the Tribe by requiring the lessee, in ¶(2), to reimburse the Tribe "for any and all damage to or destruction of property of the lessor caused by lessee's operations hereunder and not authorized by this lease * * * "

The regulations provide similar authorities and protection. 25 CFR 211.19, 211.20, and 211.21 (1989). Specifically, "[i]n the exercise of his judgment the Secretary * * * may take into consideration, among other things, the Federal laws, State laws, * * * and any regulatory action desired by tribal authorities." 25 CFR 211.21(a).

Before approving drilling permits for wells on the lease, the Department, pursuant to the Federal Government's trust responsibility to protect tribal resources, needs to satisfy itself that the proposed activities will be carried out with due regard for possible future coal mining operations.

CONCLUSION

For the reasons stated in Parts I and II of this opinion, we find that the lease form used for Tract 178 unambiguously granted to the lessee the right to produce coalbed methane.

THOMAS L. SANSONETTI
SOLICITOR

APPENDIX H

DEPARTMENT OF THE INTERIOR

DEPARTMENTAL MANUAL

Delegations — Part 209 Secretarial Officers

Chapter Solicitor — 209 DM 3.1

3.1 *General Authority.* Subject to the limitations contained in 200 DM 1 the Solicitor is authorized to exercise all of the authority of the Secretary, including, but not limited to:

A. All the legal work of the Department,

B. The authority to issue amendments of and additions to the material in the Code of Federal Regulations,

C. The administration of the oath of office or any oath required by law in connection with employment.

3.2 *Authority in Specified Matters.*

A. The responsibilities of the Solicitor in 209 DM 3.1A include but are not limited to the authority:

(1) Conferred by the provisions of 28 U.S.C. 2672, with respect to tort claims;

(2) With respect to claims under 25 U.S.C. 388, for damage arising out of the survey, construction, operation, or maintenance of irrigation works on Indian irrigation projects; and under Public Works for Water Appropriation Acts, for damage to or loss of property, personal injury, or death arising out of activities of the Bureau of Reclamation;

(3) With respect to the disposition of appeals to the Secretary:

(a) Involving estates of Indians of the Five Civilized Tribes and Osage Indians;

(b) From decisions of the Appellate Division of the High Court of American Samoa, which affirm sentences of death pursuant to section 3.0505, as amended, of the Code of American Samoa (1961 Ed.);

(4) To supervise, administer, and control all activities within or on behalf of the Department relating to intellectual property including patents, inventions, trademarks, and copyrights;

(5) When acting upon a proposal by a bureau, to acquire real estate for the United States by condemnation pursuant to section 1 of the Act of August 1, 1888, as amended (40 U.S.C. 257) whenever in the opinion of the Solicitor it is necessary or advantageous to the Government to do so and to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation;

(6) Under section 1 of the Act of February 26, 1931 (40 U.S.C. 258a), to sign declarations of taking;

(7) When acting upon a proposal to acquire real estate for the United States pursuant to section 3 of the Helium Act (50 U.S.C. 167a) by condemnation pursuant to section 1 of the Act of August 1, 1888, as amended (40 U.S.C. 257) whenever the Solicitor determines that a satisfactory agreement to acquire such land or interests in land cannot be made and that such acquisition by condemnation is necessary in the national interest and to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation;

(8) Under 43 C.F.R. Part 2, with respect to the availability of official records and testimony of employees;

(9) With respect to the settlement of claims against the United States by employees for damage to, or loss of personal property pursuant to the Military Personnel and Civilian Employees Claims Act of 1964, as amended (31 U.S.C. 240-243);

(10) With respect to claims arising under the Act of March 9, 1920 (46 U.S.C. 742, 747, 749 and 750), as amended by Public Law 92-417, also known as the Suits in Admiralty Act; and

(11) To issue final legal interpretations, in the form of M-Opinions published in Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Under Secretary, or the Secretary.

B. The Solicitor is authorized:

(1) To determine, compromise, and settle claims and demands of the United States pursuant to section 12 of the Act of August 20, 1937, as amended (16 U.S.C. 932k);

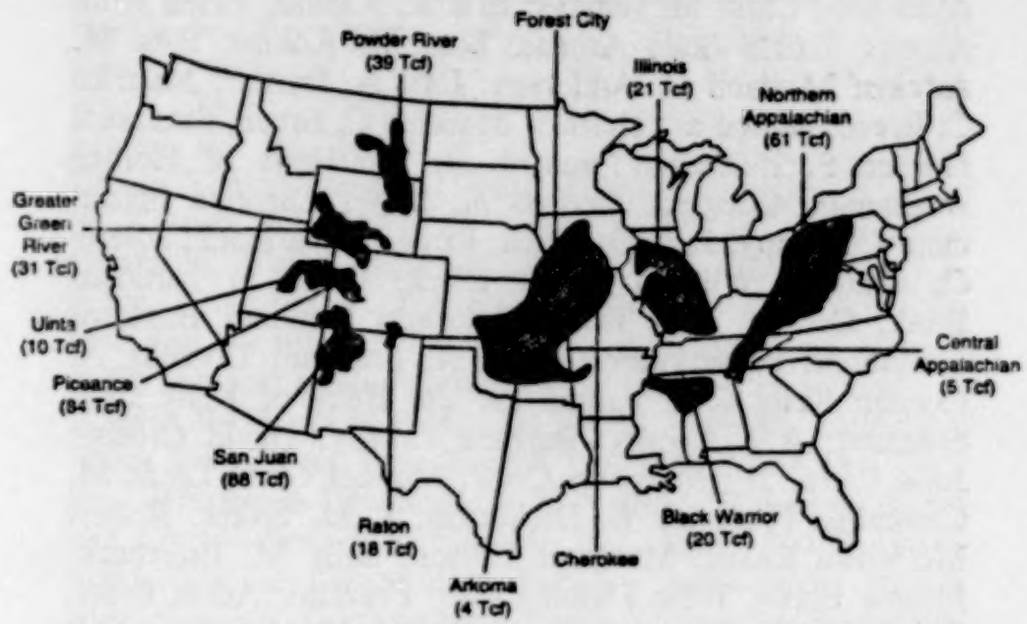
(2) If he determines in connection with a claim under a contract that, as a matter of justice and equity, all or any part of the liquidated damages assessed on or after July 1, 1949, because of delay, against a party to a contract made by the Department on behalf of the Government should be remitted, to recommend to the Comptroller General that such remission be made, pursuant to the provisions of 41 U.S.C. 256a;

(3) To accept on behalf of any Secretarial Officer service of judicial process and service of process issued by the legislative branch of the Government.

3.3 *Authority to Redelegate.* The Solicitor may, in writing, redelegate or authorize written redelegation of any authority delegated to him in this chapter except where prohibited by statute, Executive Order or limitations established by other competent authority. However, the Solicitor may redelegate the authority described in 209 DM 3.2A(11) only to a Deputy Solicitor.

APPENDIX I

Major U.S. Coalbed Methane Resources



Source: Gas Research Institute, *A Guide to Coalbed Methane Reservoir Engineering*, GRI Topical Report No. GRI-94/0397 (1994).

APPENDIX J

NAMED PETITIONER CLASS MEMBERS

Amoco Production Company; Shirley K. Adams; Henry Ashworth; Carla M. Aspaas; Eric K. Aspaas; Helen Ruth Aspaas; Laura Belle Aspaas; Leta M. Adkins; Rita M. Adkins; Maxwell C. Anderson; Earl A. Barker; Maurice C. Breen, named as: Heirs of Maurice C. Breen, deceased; Horace F. Buchanan, named as: the Heirs of Horace Buchanan, deceased; George A. Bugg; Carbone Investment Company; Jack Carmack; Rowland Carmack; Joseph C. Ciancio; William Kemp Clark; Colorado National Bank, George Veto Trust; Colorado National Bank of Longmont, conservator Gladys N. Frazzini; Dorothy A. Corgin; Kelly Cox, named as: the Heirs of Kelly Cox, deceased; A.B. Crosby; Barbara Crosby; David Crosby; John Crow, Jr.; Margaret Crow; Manuel Cruz; Louis M. Cummins; Frederick E. Dickerson; J. M. Eakes; Robert McFerran Eakes; Margaret Ellison; Sally M. Etterbeck; Minnie Flaks; Tillie Flaks; Cassio Frazzini; Adele Frost; Robert Galbasin; Abel S. Gallegos; Montey Garnand; Ruby Gibbs Goggans; Christine Hamilton; Hardin Simmons University; H.A. Harmon, named as: the Heirs of H.A. Harmon, deceased; Katherine Frances McElvain Harvey; the shareholders of Hondo Oil & Gas Company (dissolved); Hyde Oil And Gas Corporation; Charles Kettering; Fidel Lucero; Richard C. Malcomb; Suzanne Heath Manges; Catherine B. McElvain; Mabel McElvain; Thornton H. McElvain, Jr.; Dorothy N. McKelvey; Edwin L. McKelvey; R. Franklin McKelvey; W. R. McMahon; McMurry Oil Company; W. Clay Meredith Charitable Trust; W.A. Moncrief, named as: the Heirs of W.A. Moncrief, deceased; Roy E. Montgomery, personal representative for the Estate of W. Clay Meredith, deceased; Forrest D. Miller, named as: the Heirs of Forrest D. Miller, deceased; Helen L. Miller, named as: the Heirs of Helen L. Miller, deceased; Thomas S. Morrissey; Thomas J. Morrissey; Emil Mosbacher; Emil Mosbacher III; John David Mosbacher; R. Bruce Mosbacher; Myra Theresa Moulds; North Central Oil Corporation; H.L. Oliver;

Clara Onofrio; Margaret C. Pargin; Harold F. Payne, Jr.; Neville G. Penrose; Ben M. Peterson, Jr.; Frederick Petrocco; Phillips Petroleum Company; James M. Raymond; W. E. Rennie, named as: the Heirs of W. E. Rennie, deceased; Thomas C. Romolo; Benton E. Smullyen; Clinton I. Smullyen; William Stirling; J. L. Tatum, named as: the Heirs of J.L. Tatum, deceased; Anna Carleo Tomeo; Ernest Tomeo; Turner Securities; Richard W. Turner, Sr.; George C. Vance, named as: the Heirs of George C. Vance, deceased; Anthony H. Veto; Joseph F. Ware, Jr.; Albert E. Zarlengo; Anthony F. Zarlengo, John Doe and all other unknown persons claiming an interest in the mineral estate located within the N/2 of section 12, T33N, R8W, N.M.P.M., La Plata County, Colorado; Amax Oil & Gas, Inc.; Bowen/Edwards Associates, Inc.; Fuel Resources Development Company; McKenzie Methane Corporation; Meridian Oil, Inc.; Mobil Oil Corporation; National Cooperative Refinery Association; Northwest Pipeline Corporation; Pablo Operating Company; Palo/Eagle Joint Ventures; Richmond Petroleum, Inc.; Williams Production Company; Union Texas Petroleum Corporation, John Doe Oil Company and all other unknown persons or entities claiming leasehold working interests or operating rights to explore for, produce or develop coalbed methane or coal constituents from coal or coal strata reserved by the United States in patents issued under the Act of March 3, 1909, or the Act of June 22, 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservation, and which entities have not obtained tribal consent to and federal approval of said exploration, production or development activities; Class of Defendants situated similarly to those named non-governmental defendants who claim ownership of an interest in coalbed methane and other coal constituents or claim the right to explore for, develop or produce those substances from coal or coal strata reserved by the United States in patents issued under the Act of March 3, 1909, or the Act of June 22, 1910, for lands located within the exterior boundaries of

the Southern Ute Indian Reservation and which class members have not obtained tribal consent to and federal approval of said interests of rights; Jack Balle; J.M. Huber Corporation, Oil & Gas Division; Mary Jean Balle; Donald C. Ciancio; Susie M. Ciancio; NCNB Texas National Bank, as trustee of the Kelly Cox Testamentary Trust; Addie G. Crosby; Jack W. Crosland, Jr.; Henry L. Enochson; Mary Jane Enochson; J.L. Goggans; Liberty Tulsa, as trustee of the Christine J. Hamilton Trust; Helen Crosland Hendricks; Thomas L. Johnstone; James Eric Kaindl; Larry James Kaindl; Lisa Jean Kaindl; Jane P. Mosbacher, named as The Heirs of Jane P. Mosbacher, deceased; PM Associates, a Colorado general partnership; First Interstate Bank of Denver, as Co-trustee of the Estate of W.E. Rennie est W.E. Rennie; Roderick L. Turner; Wells Fargo Bank, as trustee of the George C. Vance Trust; Albert E. Zarlengo, Jr., as trustee for the Albert E. Zarlengo Trust; Bell South Corporation Health Care Trust; J. Magness, Inc.; SG Interests I, Ltd; Mosbacher U.S.A., Inc.; Land Owners Coalseam Committee.